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IN THE
Supreme Court of the United States

OCTOBER TERM, 1926. No. 305.

*Pan American Petroleum & Transport Company and Pan
American Petroleum Company, Appellants,*

vs.

The United States of America, Appellee.

BRIEF FOR APPELLEE.

I. APPELLEE'S STATEMENT OF THE CASE.

In its bill in equity Appellee asks the cancellation of contracts with Appellants dated April 25 and December 11, 1922, and leases dated June 5 and December 11, 1922, and incidentally asks for temporary and permanent injunctions, receivership and an accounting.

The prayer for cancellation is based on (1) alleged fraud tainting all the contracts and leases, (2) an alleged fraudulent conspiracy to secure the contracts and leases, (3) alleged illegality and lack of authority, and (4) the allegation that the contracts and leases were not negotiated or executed in the manner authorized by law and purported to bind the Government to performances which are unlawful and illegal.

By the contract of April 25, 1922 (R. I-27-40) the Transport Company agreed to build storage at the United States Naval Station at Pearl Harbor, Territory of Hawaii, for 1,500,000 barrels of fuel oil and fill the storage tanks with said amount of fuel oil, both the storage facilities and fuel oil to become the property of the United States upon delivery to the Transport Company of crude oil accruing to the United States from leases of oil lands in Naval Petroleum Reserves Nos. 1 and 2 in California, of a value equivalent to the cost of constructing the storage and supplying the fuel oil. Wharfage, dredging the harbor, etc., were involved in the construction of the storage facilities. The contract provided that the Government should deliver the crude oil to the Transport Company month by month as it was produced until all claims of the Transport Company under the contract were satisfied, but that in the event deliveries decreased so that the fulfilment of the contract was likely to be unduly prolonged, then the Government might grant additional leases on lands in Reserve No. 1 sufficient to maintain deliveries at the approximate rate of 500,000 barrels per annum. The Transport Company was authorized to supply the fuel oil in any amount it elected "provided that the total amount required to be supplied under this contract be furnished and the transaction completed within the time that the Government has furnished sufficient royalty oil to pay for the fuel oil and storage facilities herein called for." In the event the construction was completed at a less cost than a certain amount fixed by reference prices the saving was to be credited to the Government by reducing the amount of crude oil necessary to be delivered by the Government. A preferential right to any future leases made within certain territory in Reserve No. 1 was granted to the Transport Company in the following language (Art. XI):—

"Art. XI. It is further mutually understood and agreed that if during the life of this contract future

leases shall be granted by the Government within that portion of California naval petroleum reserve - No. 1, situated in townships 30 and 31 south, range 24 east, Mount Diablo base and meridian, the contractor shall first be called upon by the Secretary of the Interior to meet such drilling conditions and to pay such royalties as the Secretary may deem just and proper, and in the event of his acceptance of such conditions and of his agreement to pay such royalties, the contractor shall be granted by the Government a preferential lease on such tracts as the Secretary of the Interior may decide to lease. In the event of the failure of the contractor to agree to the conditions and royalties as proposed by the Secretary of the Interior, then said lease or leases may be offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in said bidding." (R. I-34.)

The statement on page 4 of the brief of Appellants that the preferential right was to exist for only 500 days is not correct. It is apparent from the method of payment provided for in the contract that the life of the contract was indefinite and might run over a number of years. In the Transport Company's proposal there was a promise to complete the construction within 500 days, but that did not determine the life of the contract.

The lease of June 5, 1922 (R. I-68-83), was a quarter section in Reserve Number 1, and was granted at the request of Appellants to enable them to perform more speedily the contract of April 25, 1922. It was given without competitive bidding and pursuant to a covering letter purporting to be an addition to the contract of April 25, 1922 (R. I-65).

The contract of December 11, 1922 (R. I-41-50) referred to the April 25th contract; recited that the Navy desired to procure additional fuel oil and storage facilities at Pearl Harbor and elsewhere of a value of approximately \$15,000,000; recited the preferential right of the Transport Company

to leases in Reserve No. 1 and that existing leases were not producing sufficient royalty crude oils to accomplish the purposes of the April 25th contract. It was agreed that as a supplement to the contract of April 25th the Transport Company should deliver the fuel oil required under the April 25th contract into the Pearl Harbor tanks when and as directed by the Secretary of the Interior, should construct for the Government at Pearl Harbor additional storage facilities up to 2,700,000 barrels in capacity at cost and complete the same within two years from delivery of plans and specifications if requested by the Government. The Transport Company further agreed to furnish petroleum products other than fuel oil required by the Navy at Pearl Harbor at market price; to furnish without charge until the expiration of the contract storage for 1,000,000 barrels of fuel oil at Los Angeles and fill the same with fuel oil; to bunker Government ships from said 1,000,000 barrel supply at cost; to transport royalty oils derived from the leases in Reserves Nos. 1 and 2 to Los Angeles free from any pipe line charge; to maintain, subject to the demands of the Navy, for the period of 15 years, 3,000,000 barrels of fuel oil at Atlantic Coast points; to furnish such reasonable amount of crude oil products and storage facilities therefor at such points as should be designated by the Government under similar terms and conditions; to give the Navy the privilege of purchasing fuel oil produced from Government lands in Reserves Nos. 1 and 2 which it might require above the amount received in exchange for its royalties at 10 per cent. less than market price at tidewater; to sell the Navy refined oil products at 10 per cent. less than market prices.

The Government agreed (1) to lease to Transport's subsidiary company, Petroleum Company, all unleased portions of Number 1 Reserve, (2) to deliver to the contractor all royalty oil, gas and casing-head gasoline produced or to be produced from Reserves Nos. 1 and 2 until all obligations

under the April 25th contract and the instant contract were discharged and "in any event for a period of 15 years from the date of the expiration of said contract of April 25, 1922, the Government to be given credit by contractor for such crude oil delivered by the Government at the published field price thereof on date of delivery and for such gas and casing-head gasoline at the prices and under the conditions fixed in the various leases, any surplus of Government credits thus accruing are to be satisfied by delivery of fuel oil or other petroleum products, by construction of additional storage facilities, or to be payable in cash, as the Government may at that time elect (R. I-48)."

It will thus appear that the Government was under the obligation of delivering to the Transport Company all royalty crude oil from the Naval Reserves for 15 years after the expiration of the contract of April 25, 1922 (the life of which might extend for years) regardless of the fact that the defendant Transport Company might have already been paid in full under both construction contracts; and it is therefore apparent that the statement of Appellants at the top of page 7 of their brief that the Government agreed under the contract of December 11, 1922, "to deliver to the Transport Company as and when produced from Naval Reserves Nos. 1 and 2, California, crude oil at the posted field price thereof in amount equal to the cost of the construction of the storage facilities, without profit, and the market price of the oil delivered into those facilities, plus transportation at going rates" only partially states the obligation of the Government, the completeness with which it parted with the petroleum products from Naval Reserves Nos. 1 and 2, and the long time during which the Government would be bound to the Appellant companies.

The lease of December 11, 1922 (R. I-50-65) given as part consideration for the contract of the same date, demised the entire unleased portion of Reserve No. 1 to the Petroleum

Company for twenty years and so long thereafter as oil and gas is produced in paying quantities and provided that the lessee should pay a royalty according to a schedule ranging from 12½ to 35 per cent. No drilling was to be done without the consent of the Government on lands located in the western half of the reserve. All discretionary matters reserved to the Government were to be exercised by the Secretary of the Interior.

Attention is called to the fact that the Appellants inaccurately state (Appellants' brief, pp. 8-10) that cancellation was sought and awarded upon the ground of a conspiracy to defraud, thus ignoring the finding of the District Court that there was also fraud as a distinct ground apart from the ground of a conspiracy to defraud and that cancellation and an accounting were awarded upon both grounds.

The Court of Appeals summarized the conclusions of law of the District Court as follows (R. III-1496):—

“* * * that the payment of \$100,000 by Doheny to Fall was *contra bonos mores* and against public policy; that it is immaterial whether the directors and stockholders of the Transport Company knew of said payment; that the making of said payment constitutes a fraud upon the United States and renders voidable all contracts and transactions made subsequent thereto between said corporation or its codefendant and the United States; that Doheny and Fall conspired and confederated for the making of certain contracts and agreements of great benefit and advantage to the Transport Company, to wit: the contract of April 25, 1922, Exhibit 'B,' of the complaint, the contract of April 25, 1922, Exhibit 'E,' the lease of June 5, 1922, the contract of December 11, 1922, and the lease of December 11, 1922; that the contract of April 25, 1922, Exhibit 'B,' was not let upon competitive bidding; that that contract and the contract of December 11, 1922, Exhibit 'C,' the lease of June 5, 1922, and the lease of December 11, 1922, are voidable at the option of the United States and should be delivered up to be

cancelled; that the contract of April 25, 1922, Exhibit 'B,' and the contract of December 11, 1922, are null and void and of no effect because they constitute unlawful delegation of authority to the Secretary of the Interior contrary to the terms and provisions of the Act of June 4, 1920, and they should be surrendered for cancellation; that the executive order of May 31, 1921, is, in so far as it attempts to transfer the discretionary power of the Secretary of the Navy to the Secretary of the Interior, ineffectual and in excess of the executive power of the President; that the lease of June 5, 1922, was part of the consideration of an illegal contract, to wit: the contract of April 25, 1922, Exhibit 'B,' and the same should be delivered up for cancellation; that the lease of December 11, 1922, constituted part of the consideration given by the United States for the contract of December 11, 1922, which contract being wholly void and illegal, the said lease also is void and illegal and should be delivered up for cancellation; that the defendants should cease to trespass upon the lands of the United States and forthwith surrender possession thereof and be enjoined and restrained from further operations or activities of any kind on said lands and from removing any materials, tools, machinery, etc., therefrom.

"In view of the equities between the parties, the Trial Court concluded that the defendants should be paid for and allowed credit for moneys actually expended in the construction of the storage facilities at Pearl Harbor and that a complete account should be taken between the plaintiff and the defendants to determine the total and gross amount of oil petroleum products the defendants have taken from the lands covered by the lease of June 5, 1922, and the lease of December 11, 1922, and the money value of such products so taken, and upon ascertaining the total gross quantity of such products and of the pecuniary value thereof, such sum to be found due, if any, upon such accounting, should be paid by the defendants to the plaintiff, and that in such accounting the defendants be entitled to be credited with the cost price of the storage facilities so completed and installed

a contention as to whether those claims were valid. No plan for administering these Naval Petroleum Reserves was provided by Congress until the General Leasing Act of February 25, 1920 (41 Stat. 437), in which act a method of compromise with holders of placer mining claims in the Naval Reserves was prescribed. (See Sections 18 and 18a of this act at p. 295 of this brief.) But no plan was provided for administering land in the reserves not covered by placer claims and the statement by counsel (Appellants' brief, p. 13) that this act committed the administration of the reserves to the Secretary of the Interior is not accurate.

Under that act a large portion of Reserve No. 2 had been leased in compromise of alleged placer claims. No. 1 was comparatively free of such claims. Then the Act of June 4, 1920, which is quoted in full at page 298 of this brief, was passed.

In order to protect the northeastern border of Reserve No. 1 from drainage by drilling outside its boundaries, the Navy Department, prior to the incumbency of Secretary Denby, had determined to do a small amount of offset leasing (R. I-124).

Secretary Denby continued this policy, insisted that the leasing be by competitive bidding (Pl. Ex. 272; R. III-1174), and by his orders bids were asked from proposed lessees for this offset leasing on April 14, 1921 (R. I-114, 115, 129). The invitation was for the drilling of 22 offset wells in two rows in a 900 foot strip along the northeast border of Section I-31-24 (R. I-115). This leasing was under the Act of June 4, 1920.

Before an award had actually been made upon the bids so submitted (viz., on May 31, 1921), the President of the United States had made the Executive order which is quoted in full on page 299 of this brief.

A draft of this order was transmitted by Secretary Fall to Secretary Denby on May 11, 1921 (R. I-311). Secretary Fall evidently expected the order to go to the President in

the form in which he had drawn it, for he transmitted with his letter not only the draft of the Executive order, but a draft of a letter to be signed by Secretary Denby transmitting the order to the President for his signature (Def. Ex. 1; R. I-457). Certain Navy officials were doubtful of the wisdom of having the order drawn in the manner suggested by Fall, and as a result of conferences the draft was ultimately changed, and as changed submitted to Fall by Assistant Secretary of the Navy Roosevelt; Fall agreed to the changes, and the draft as changed was presented to the President by the Assistant Secretary of the Navy and signed by the President. (R. II-944, 945, 946.)

2. Origin and development of fuel oil storage plan.

Shortly thereafter, pursuant to the policy declared by the Executive order, the Navy forwarded the bids for the proposed offsetting leases to the Secretary of the Interior (Pl. Ex. 54, R. I-313). The bids were opened by Assistant Secretary Finney and scheduled by Dr. Mendenhall of the Interior Department (R. I-315) (Def. Ex. K-a; R. I-470). Finney left Washington (R. I-315), and Fall assumed to settle a controversy that had theretofore arisen over a claim to a certain portion of said Section 1 by the United Midway Oil Land Company, which claim had already been denied by Secretary Payne and Assistant Secretary Finney (R. I-313).

Dr. Mendenhall, of the Geological Survey, who had been chosen at the suggestion of Assistant Secretary Finney to act as adviser to Secretary Fall in naval reserve oil matters (R. I-312, 313), and Commander Stuart, of the Navy, who was then and had for some time been in charge of oil reserve matters for the Navy (R. I-112, 113, 114), disapproved of Secretary Fall's proposed settlement of the claim and got into a controversy with him over the settlement (R. I-116, 125, 126, 315, 472). Admiral Griffin, of the

Navy, also objected to the proposed settlement and participated in the controversy (R. I-116, 125, 472).

The upshot of the matter was that, although it had been determined from the bids submitted that Mr. Doheny's company, the Pan American Petroleum Company, had bid the highest royalties, Fall awarded fourteen of the offset wells to Doheny's company at its bid, and eight wells to the United Midway Company at the same royalty rates (R. I-117, 125, 126, 127, 315). This settlement was the subject of correspondence between Secretary Fall and President Harding, the matter of the United Midway claim having been referred to Fall by the President (Def. Exs. L & M; R. I-470-75), and was evidently the subject of some negotiation between Fall and Doheny on the footing of the intimacy which then existed between Fall and Doheny (R. I-134, 473).

Referring to the settlement which he had made, Secretary Fall wrote to Mr. Doheny on July 8, 1921, a letter thanking him for his generosity in permitting Fall to make the settlement, and in this letter said (Pl. Ex. 12; R. I-133):—

"I have settled the matter today and have signed your leases, sending them over to you by Mr. Cotter."

In the same letter, he quoted from his letter to President Harding concerning the settlement, in which he had said:—

"Thus my position is that of * * * a trustee for the Navy for the public lands upon which there is no private claim within the naval reserve."

and went on to say to Mr. Doheny:—

"There will be no possibility of any further conflict with the Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matter of naval leases under the direction of the President, without calling any of his force in consultation unless I conferred with himself personally upon a matter of policy. He understands the situation and **that I shall handle**

matters exactly as I think best and will not consult with any officials of any bureau in his department, but only with himself and such consultation will be confined strictly and entirely to matters of general policy."

Appellants throughout their brief repeatedly stress the close personal relations between Fall and Doheny (pp. 20, 66, 181, 275-76).

Within two months after the Executive order was signed, Secretary Fall originated the plan which was afterwards carried into execution with the defendant Transport Company, of "exchanging" royalty oil from the naval reserves for fuel oil in tanks, the royalty oil to constitute the consideration for both the fuel oil and the tanks in which it was to be stored. He wrote to Secretary Denby on July 23rd making this suggestion (Pl. Ex. 13; R. I-136). On July 29th Secretary Denby wrote that he was glad to acquiesce in Fall's suggestion, and that such an arrangement would be of great benefit to the Navy (Pl. Ex. 14; R. I-137).

The statement (Appellants' brief, page 21) that the Navy Council had already considered such a plan, is, we think, incorrect. What the Navy was then considering was whether it should purchase oil tankers for storage of fuel oil, or should in making contracts for its current use fuel oil have the contractor include in his bid the cost of storage of the oil until the Navy should need it for current use. The discussion was of the use of the Navy's cash appropriation, and had no relation to the naval reserves or the use of the royalty oil therefrom. The consideration given Fall's suggestion of July 23rd, as stated on pages 21 and 22 of the Appellants' brief, shows that it was a new idea to the Navy Department.

Almost immediately thereafter Fall went West (R. I-129, 316; II-830; III-1110), for the avowed purpose of conferring with oil men on the Pacific Coast (R. II-481) and remained away from Washington until October 17, 1921 (R. I-316;

II-830; III-1110). On August 5th he saw, by appointment, in San Francisco, Commander Landis, a retired naval officer then in charge locally of the California naval reserves, with the title Inspector of Naval Petroleum Reserves (R. I-129); and in conversation with Landis stated that Mr. Doheny had been in Washington complaining that in his judgment the royalties in the lease granted to his company, above mentioned, in July, were too high, and Fall said that he thought probably they were (R. I-130). While on his trip he reported in writing to the President that he had interviewed oil men and that the Navy could at any time upon notice to him secure storage and fuel oil, to be paid for out of royalty oil (Def. Ex. P; R. II-482).

Before Fall returned to Washington, viz., on October 1, 1921, Captain J. K. Robison was appointed Chief of the Bureau of Engineering, with the rank by virtue of his office of Rear Admiral (R. II-951). Robison wrote an intimate and friendly letter to Doheny on October 6, 1921, advising Doheny of his appointment (Pl. Ex. 23; R. I-145). Robison's friendship with Doheny was also one of long standing and intimacy (R. II-952, 953, 954); and is freely admitted in the brief of Appellants (pp. 23-24, 188).

On or about October 18, 1921, Secretary Denby apparently discovered that Commander Stuart was in charge of the Fuel Oil Office, although in fact Stuart had been in charge of that office when Denby came in as Secretary in March of that same year and had ever since functioned in that capacity (R. I-113, 114, 121; II-954, 955). This is one significant fact in connection with the alleged close touch which Denby kept with oil matters. After speaking to Robison about the matter, Denby detached Stuart from his special duties in charge of the Fuel Oil Office and returned him to the Bureau of Engineering, issuing a Department order putting fuel oil matters under the Bureau of Engineering of which Robison had just become Chief (R. I-114, 117, 118, 122, 123, 124; II-955).

At almost the same moment Secretary Denby, in a Navy Council meeting, made the following statement with regard to the naval reserves (Pl. Ex. 273; R. III-1176):

"We can't prevent granting oil leases. I by executive proclamation had it placed under the Interior Department. We are not in position to organize a new department to dig wells. I want the Interior Department when a tract is to be opened in part or full, I want them to do it for the best interest of the Navy. **That matter of leasing is most difficult and dangerous thing to be done. It is full of dynamite. I don't want to have anything to do with it.**"

At about the time of this statement by Secretary Denby, Admiral Robison, then newly in charge of naval oil reserves for the Navy, conferred with Secretary Fall concerning the policy to be pursued therein (R. I-146; II-959, 960; III-1051). As a result of that conference Fall and Robison in collaboration prepared a draft of a letter which was submitted to Secretary Denby and signed by him on October 25, 1921 (R. III-1111). This letter may be found in full as Pl. Ex. 24; R. I-146. Certain portions of it are of great importance as showing what was represented to Secretary Denby to be the purpose and policy concerning the reserves, and as showing that Fall and Robison even at that early date were formulating the policy without much reference to Secretary Denby.

Admiral Robison testifies (R. III-1052, 1053) that it was agreed between him and the representatives of the Interior Department that Naval Petroleum Reserve No. 2 had been so checker-boarded with private claims and leases under the Act of February 25, 1920, that it could not be saved; and that it was determined not to drill Naval Petroleum Reserve No. 1 except for protective purposes.

Certain paragraphs from this letter are important. They are as follows:

"1. That arrangements will be made by the Interior Department to have naval petroleum reserves Nos. 1 and 2 drilled with offset wells in every case where adjacent property is drilled." (R. I-147.)

It will be noted that the reference in this paragraph is solely to offset wells, and not to any general leasing. This is enforced by paragraph 2 which reads as follows:

"2. That the amount of drilling with consequent exhaustion of the reserves shall be kept as low as practicable without risking the depletion of the reserves by other parties." (R. I-147.)

Paragraphs 3 and 4 deal with an exchange of crude oil for fuel oil and with the use of any overplus for obtaining fuel oil in storage at Pearl Harbor, Hawaii, and other points.

Paragraph 5 is extremely important. It reads:

"5. That the Interior Department will exercise its best efforts to obtain for the Navy as large royalties and as favorable terms as practicable by public competition **or otherwise.**" (R-I-147.)

Admiral Robison testifies with regard to this paragraph that when the letter was drawn the words "or otherwise" were omitted, and that Secretary Fall requested that they be inserted (R. II-965; III-1111, 1112). These words were inserted by Robison pursuant to Fall's request and before the letter was submitted to Secretary Denby (R. III-1111-12); and were not inserted by Denby, as counsel for the Appellants erroneously state at page 25 of their brief. Admiral Robison explains that he agreed to the insertion because he thought that some of the leasing would be done under the Act of February 25, 1920, and that as compromise leases were made under that act not by competitive bidding, the words "or otherwise" were inserted to take care of this contingency (R. II-965; III-1112).

This explanation is wholly unsatisfactory. It goes without saying that this letter did not refer to any such matter, and that unless the words "or otherwise" had been inserted, Fall's hands would have been tied and he would have been unable to make any leases by private negotiations (which was afterwards done with Doheny) and that the Government would have been protected. Admiral Robison's statement as to what explanation he made to Secretary Denby on this subject is extremely unsatisfactory. It is (R. II-965, III-1112):

"Witness told Secretary Denby that the handling of public lands was something that was so frequently done by the Interior Department that he thought they had better be given a chance to do it in their usual way." (R. II-965.)

"Witness told Secretary Denby that these had been included at the instance of the Interior Department, particularly to provide for the cases of pending claims on oil lands in the reserve. It had been explained to witness that where there were pending claims, those were to be settled under the Act of February 25, 1920. Of course, witness knew that it wasn't so, that such pending claims are always settled by the grant of a lease on some part of the reserve." (R. III-1112.)

Paragraph 7 indicates very clearly, as had every action taken by the Navy down to that time, that the Navy had, as Secretary Denby indicated on October 18th, surrendered all powers to the Interior Department so far as making any leases was concerned. It provides:

"7. That all leases and contracts, except as provided in paragraph 6, will be arranged and consummated by the Interior Department, copies of same being furnished to the Navy Department **as a matter of information and record only.**" (R. I-148.)

By letter of October 30th Secretary Fall expressed his compliance with the policy set forth in the foregoing letter (Pl. Ex. 24-A; R. I-149).

At the conference between Fall and Robison about the middle of October, 1921, two very significant things happened. In the first place Robison called Fall's attention to the fact that the royalty oil from the Naval Oil Reserves was being sold for cash and the cash turned into the Treasury where the Navy could not make it available except by appropriation of Congress. As he puts the matter, he did not know how to put a stop to this (R. II-959). At that conference Fall called Robison's attention to his, Fall's, letter of July 23, 1921 (Pl. Ex. 13; R. I-136) referred to above, and said that he, Fall, would help the Navy in this matter (R. II-959, bottom, 960, top). At this conference there were present not only Robison and Fall, but Dr. Bain and Mr. Ambrose of the Bureau of Mines (R. II-713).

The second significant thing that happened was that Fall, in discussing the plan to use royalty oil as a consideration for procuring fuel oil in storage, stated that he had been "considering a plan for using the royalty oil for tankage * * * " and said, referring to an earlier conference with Doheny, "he was satisfied that Mr. Doheny would make a bid" (R. II-831).

In Appellants' brief no criticism is made of the Trial Court's findings Nos. 17 and 18 (R. III, 1399-1400) to the effect that conferences were had between Fall and Doheny prior to October 25th relative to the subject matter of Fall's letter to Secretary Denby of July 23rd, and relative to the procurement of tankage and fuel oil by the use of royalty oil. These findings were supported by the correspondence between Fall and Doheny (Def. Ex. F-5; R. III-1154; Pl. Ex. 33; R. I-162), and by Dr. Bain's testimony (R. II-831).

In accordance with the agreed policy, the matter of first importance was the procuring of fuel oil for current use in exchange for royalty oil. It having been determined that No. 2 Reserve was not available any longer as a reserve, and that it should be drilled up to get the oil out and prevent de-

pletion of the remaining unleased sections, Secretary Fall, in November, inquired of all the then lessees whether they would take additional leases under the Leasing Act and put in train the making of additional leases to all then existing lessees (Pl. Ex. 27; R. I-151, 152).

On or about November 28, 1921, there was pending at least one business transaction between Fall, representing the Interior Department, and the Appellant, Petroleum Company.

We have above set forth how the Appellant, Petroleum Company, obtained a lease for fourteen wells in the northern part of Section 1-31-24 in July, 1921, and have shown that Mr. Doheny had been complaining to Mr. Fall in the summer of 1921 that the royalties were too high. In October or November, 1921, a representative of said Company and a representative of the United Midway Company who had received a lease for the balance of the strip in question, called on Assistant Secretary Finney and asked for relief, stating that the gas pressure was off this land, that the wells were pumpers and that the companies could only operate at a loss under the high royalty they had bid (R. I-322; II-488). Finney advised them that as the leases had been let by competitive bidding he did not think such relief could be granted but told them to put their petitions in written form (R. I-322; II-489). This was done and the petitions were filed on November 22 and 23, 1921 (Pl. Exs. 31 and 32; R. I-156 and 159).

The relief asked was by way of reduction of royalties under existing leases which had been granted after competitive bidding to the concerns offering the highest royalties. Finney at once saw the impropriety of reducing the royalty which had been fixed by open and public competition, and expressed this view to Fall (R. I-322; II-489). Of course there was nothing for Fall to do but to concur (R. I-322; II-490). Fall had shown as early as August, in a conversation with Commander Landis, that his thought was that Mr.

Doheny's company should be relieved (R. I-130). Before Fall left for the West on December 1st, therefore, he gave definite directions to Finney as to what should be done (R. I-322; II-490), viz., that the petitions for relief by reduction of royalties under existing leases should be refused. This was formally done some time after Fall left for the West (Pl. Ex. 59; R. I-324). In addition Fall directed that Pan American and United Midway Companies should be given relief by granting them leases on additional territory in Naval Reserve No. 1 at a lower rate of royalty, thus averaging their royalties as between the existing leases and the new ones (R. I-322; II-490); and such relief leases were granted on December 14, 1921 (Pl. Exs. 57 and 58; R. I-323-24). Of course this was a mere indirect method of doing what could not be accomplished directly without serious criticism. Incidentally, it might be mentioned that the United Midway Company, which held the lease (Pl. Ex. 58; R. I-323, 324) adjoining the Pan American lease (Pl. Ex. 57; R. I-323) and was one of the applicants for relief (Pl. Ex. 32; R. I-159) some months later, and before the contract of April 25, 1922, was made, assigned its leases, original and relief, to the Pan American Company (Pl. Exs. 100, 101; R. I-391). We find nowhere in the Record any justification for the statements that the relief granted was granted upon the recommendation of Finney or that Secretary Denby directed the relief leases to be made. Admiral Robison testified without contradiction that he told Fall that the relief applications should be refused (R. III-1049).

We have already adverted to Fall's reference at the October 25, 1921 conference to his prior meeting with Doheny and his conviction that Doheny would make a bid under Fall's plan for using the royalty oil for tankage. This expected bid was received on November 28, 1921, and was in the form of a letter, which reads as follows (Pl. Ex. 33; R. I-162):—

"PAN AMERICAN PETROLEUM & TRANSPORT CO.

"Office of the President

"NEW YORK, November 28, 1921.

"The Honorable the Secretary of the Interior, Washington, D. C.

"DEAR MR. SECRETARY:

"Along the lines of your suggestion, I have made some inquiries regarding the cost of constructing tanks for the storage of one and one-half million barrels of fuel oil at Pearl Harbor. I find that the best price obtainable for these tanks, the Government to stand the cost of transporting the material from the ship's side to the tank site, and the cost of grading and otherwise preparing the tank site, is \$19,960 per tank, or \$.0363 per barrel of storage capacity.

"The present price of crude oil in the field in California is \$1.13 per barrel. The present cost of fuel oil delivered at Pearl Harbor is \$1.90 per barrel.

"The cost of 1,485,000 barrels of fuel oil delivered at Pearl Harbor at present rates would be \$2,821,500, which added to the cost of constructing the 27 tanks necessary to store this amount of oil, which is \$538,920, makes a total of \$3,360,420.

"Therefore, were we to construct the tanks and furnish the oil on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserve and to be leased to us, it would require a return to us in royalty crude valued at \$3,360,420, or 2,973,823 barrels, figured at to-day's price. Of course, interest on the money invested should also be figured until final adjustment is made through the payment of royalty oil.

"I suppose you will turn this matter over to First Assistant Secretary Finney, who, with Rear Admiral Robison, may arrange the details of it during your absence, and as I also expect to be absent,

I am confidentially furnishing Mr. Cotter with the information so that he can intelligently discuss the matter with Mr. Finney.

Cordially yours,

E. L. DOHENY."

(Bold-face type ours.)

Three things should be noted in connection with the above letter. The first line of it clearly demonstrates that Fall and Doheny had been in conference about this matter. As Fall and Doheny had conferred prior to October 25, 1921, upon the fuel oil storage plan, it can not be said that the conference referred to in the first line of the letter was a subsequent conference in November, 1921, as Appellants endeavor to do (Appellants' brief, p. 237).

The third paragraph clearly indicates that in Fall's conference with Doheny the leasing of lands in the Naval Reserves to Doheny's company had been discussed as a part of such a contract. The same paragraph clearly demonstrates that **so far as the construction and furnishing of fuel oil was concerned Doheny's company was only to receive the cost of the same plus interest and that no profit from this branch of the business was to be expected.** This latter matter assumes great importance in view of certain testimony of Admiral Robison, hereafter to be mentioned.

Lastly, it is to be noted in connection with the foregoing letter that Mr. Doheny assumes that the **principle** of the matter has been settled and that it remains only to work out the details of the arrangements. It is also quite evident from the letter that Mr. Doheny was familiar with Mr. Fall's intended absence in the West. (It is admitted that Fall left for the West December 1, 1921.) (R. II-490.)

Appellants have insisted and still insist that the above letter (Pl. Ex. 33; R. I-162) was a mere "estimate" (Appellants' brief, pp. 27, 278). That it was not so we think can be demonstrated from what occurred. It will be noted that in

the letter Mr. Doheny states that he is "confidentially furnishing Mr. Cotter (Vice-President and Attorney for Pan American) with the information so that he can intelligently discuss the matter with Finney" (R. I-163). The letter was received by Fall presumably on November 29th, the day after it bore date. On that date Cotter was in Fall's office. What did Fall do with Doheny's letter? He sent it on November 29th, by the hand of Cotter, to Admiral Robison. The letter of transmittal is Pl. Ex. 34; R. I-163, and is as follows:

"NOVEMBER 29, 1921.

"MY DEAR ADMIRAL:

"**Mr. Cotter** will wait upon you with data, etc., with relation to oil tanks and royalty oils in connection with Pearl Harbor demands.

"**I have asked him also to hand you, for your inspection, the original of a letter from Colonel Doheny addressed to myself, containing a resume of the data.**

"**Should you think best to accept this proposition then of course it would be necessary, in my judgment, to turn over to Col. Doheny, if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan American.**

"The gas pressure is lessening to such a degree that the output of the wells of the two latter companies, as well as of other companies drilling in this neighborhood, is decreasing and is very disappointing. The two companies named are pumping their wells and of course they are not making any money but will experience a loss in the payment of the fifty-five per cent. royalty to the Government.

"**If you approve the proposition, will you kindly indicate to me such approval by simple endorse-**

ment upon Col. Doheny's letter to myself, signed by yourself. Your simple O. K. will be sufficient.

"Very sincerely yours,

"ALBERT B. FALL."

(Bold-face type ours.)

The portions of this letter which we have printed in bold-face type show first, that Cotter was sent with the letter to Admiral Robison. In the letter Fall refers to Mr. Doheny's letter as containing a "proposition" ready for acceptance—not an "estimate." Fall is careful to call to Robison's attention that if the proposition is accepted the Government will have to give Doheny's company additional leases at better royalties than those then being paid by the company in Reserve No. 1.

At the end of the letter Fall again calls the matter a "proposition" and asks Robison, if he approves the "proposition," simply to write his O. K. on Doheny's letter. It is as plain as anything can be that Fall expected Robison to do this and that he proposed then to go ahead with the transaction himself.

The correspondence between the Lacey Manufacturing Company and the purchasing agent of the Appellant, Petroleum Company, in November, 1921 (Pl. Exs. 267-70; R. III-1169-70) and Gano Dunn's letter of June 19, 1922 (Pl. Ex. 271; R. III-1171) are further evidence that Mr. Doheny's letter of November 28, 1921, was more than an "estimate."

On page 35 of their brief in the Circuit Court of Appeals, Appellants admitted that "there is no question but that this plan was under consideration by Secretary Fall and Mr. Doheny * * *." They say this after commenting on the letter of November 28, 1921 (Pl. Ex. 33; R. I-162); and after referring to the language therein used concerning "lands within the naval reserve and to be leased to us," they then add that there is no evidence of any impropriety in such consideration or discussion as there may have been between these

two men. We shall hereafter call attention to the fact that this letter was written and being considered at the very time of the \$100,000 transaction between Fall and Doheny.

But there is more than this to the situation. The construction of Pearl Harbor storage involved only the taking of royalty oil from leases on lands within the naval reserves and in consideration of the receipt of that royalty oil turning over to the Government fuel oil and building the structures for its storage. When it suits their purposes Appellants' counsel make this matter very clear. **It was not a project which, in itself, involved any leasing at all.** The royalty oil running to the United States came from a large number of existing leases in Reserve No. 2 and from such leases as had been granted to Pan American and others for offset drilling in Reserve No. 1. Why then should Fall have said to Admiral Robison in his letter of November 29th (Pl. Ex. 34; R. I-163) that in order to get Mr. Doheny's company to take this royalty oil and give the United States some value in return for it, "of course it would be necessary, in my judgment, to turn over to Col. Doheny, if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan American."

Does not this clearly indicate conferences between Fall and Doheny and that Doheny and Fall in these conferences had discussed this very matter of further leases which, as above pointed out, in fact had no necessary connection whatever with the so called exchange contract for the royalty oil?

As we shall hereafter demonstrate, when the formal contract with Doheny came to be made some months later, it did involve the making of additional leases in the naval reserve and did contain a covenant for the making of still further leases at lower royalties than the Pan American was then paying,—exactly what Fall was predicting in his letter of November 23.

Robison also looked upon Doheny's letter of November 28, 1921, as a definite proposition, for a few minutes after receiving it with Fall's covering letter on November 29th he carried it into a meeting of the Navy Council (R. II-972-73); and when questioned in that meeting about the fuel oil storage facilities of the Navy said: "I have here a definite proposition to supply that; a proposition for the completion of the entire Pearl Harbor project during the next calendar year. The other steps in the matter of the provision of fuel oil reserves along the Pacific Coast, in accordance with this plan, could be completed within less than five years, that is from the Panama Canal to Puget Sound. That is what I hope to accomplish. I think that is the Secretary's idea."

Up to that moment the understood policy of the Navy had been to use royalty oil in exchange for current use fuel oil. At that meeting Robison advocated the policy of not using the royalty oil for exchange for current use fuel oil at all, but on the contrary using it for the building of tankage and filling the same with reserve fuel oil (R. II-972-75). He had previously consulted with the Judge Advocate General of the Navy and obtained his oral opinion that the fuel oil storage project was legal (R. II-981).

The minutes of this same meeting make it quite clear that the important thing in Mr. Denby's mind was the fear of drainage of the reserves by outsiders and that he had no thought of leasing for any purpose but protection. Secretary Fall had previously told Secretary Denby that if the latter didn't tackle the Naval Petroleum Reserves at once, there would be no oil to get in three months (R. II-973). This representation was corroborated by the statement of Robison at the meeting that "a message from the Interior Department within five minutes says the gas pressure is lessening and decreasing; it is very disappointing. They will experience a loss in the payment of royalty to the Government."

Secretary Denby evidently intended that any protective leas-

ing should not be done without the approval of the President and Congress. When Robison pressed Secretary Denby for an answer to the Doheny proposition, the latter replied, "I will have to go into that further * * * that is a matter of national policy I do not want to decide until I have seen the President and probably will take it up again with Congress." Later in the meeting, Robison again said, "Shall I go ahead with those tanks?" and Denby replied, "Not until I have seen that committee." (R. II-972-73).

As we shall hereafter demonstrate there was no excuse whatever for such statements by Fall and Robison to Denby at that time and it is agreed on all hands that there was no necessity for leasing up the whole reserve on December 11, 1922, about a year later, to prevent drainage.

It is further clear that Admiral Robison assured the Council that all he had to do was to O. K. Doheny's letter, as Fall suggested, in order to get the tanks. Robison said to the Council: "All I have got to do is to say on this letter is we can get the tanks built. I cannot say, of course, as to these tanks until I have seen the plans and make sure these plans correspond with our specifications" (R. II-974). Then occurs this very significant sentence, which shows that Robison was entirely familiar with the plan to get a bid from Doheny: "I sent a memorandum to the Chief of the Bureau of Yards and Docks some three weeks ago, but Bakenhus has not seen it" (R. II-974). (Bakenhus was then connected with the Bureau of Yards and Docks and was at the Council meeting.) The Bureau of Yards and Docks prepared the specifications for the Pearl Harbor job.

It is quite evident that while the existing program in November, 1921, was to use the royalty oil to procure a supply of current use fuel oil, Robison fought to reverse this policy (*i. e.*, not to use the royalty oil for current use at all, but to use it for the purchasing of reserve fuel oil and the construction of tanks at Pearl Harbor) and Robison won his fight and

Robison's earlier policy of fuel oil storage was restored (R. II-964, 965, 972-75, 981, 991, 995; III-1081, 1094).

At the October, 1921, conference with Robison, Secretary Fall expressed grave doubts about the legality of Robison's plan (R. III-1079, 1080), and it was evidently determined between him and Robison to arrive at some conclusion concerning the legality of the plan, and if possible, to use the oil for construction rather than for exchange for current use. This was done as soon as could be done, and the temporary policy of exchange for fuel oil was reversed, as Fall undoubtedly expected it to be reversed. We say he expected it to be reversed because it will be remembered that he sent Doheny's proposition contained in the letter of November 28, 1921 (Pl. Ex. 33; R. I-162) to Robison with a covering letter (Pl. Ex. 34; R. I-163), in which he showed every expectation that Robison would O. K. the proposition and it would go forward.

More than this, before leaving Washington on December 1st, when counsel for Appellants would have us believe that the sole policy was the exchange of crude oil for fuel oil, Fall handed Doheny's proposition to Bain and told Bain to try his hand at evolving a plan along these lines (R. II-719, 833). The Appellants sedulously avoid any reference to this testimony, when they trace the course of this letter (Appellants' brief, pp. 241-42); and by the half-statement "where it came into the possession of Dr. Bain of the Bureau of Mines along about the 1st of December, 1921, without any instructions," counsel seek to create the impression that the letter in some unexplained manner fell into Bain's hands.

Moreover, that the original intention of both Fall and Robison was to use the oil for storage and to make a construction contract, is shown by the telegram of Finney of December 6, 1921, to Fall (Pl. Ex. 237; R. I-329), in which Finney says:

"Navy Department requests that we proceed **as originally planned** with reference to exchange of oil and securing storage."

Many statements are made in Appellants' brief (pp. 32-34) to the effect that the storage plan was acquiesced in by the Interior Department without Fall's concurrence or without his being informed about the matter at all. It is sought to give the impression that Fall knew nothing about the Navy's desire to have this plan followed out at or about the beginning of December. We think the above quoted telegram effectually disposes of this suggestion.

Any fair reading of the Record will, we think, convince that the "original" plan is the one that was carried out, and that it was only because of doubt as to the ability to carry it out, and as to Denby's consent, that it was temporarily laid aside in November.

How Doheny's letter of November 28th got back to Fall the Record does not disclose, but certain it is that between November 29th and December 1st, Fall again had it, because before he left for the West on December 1st he handed that letter to Dr. Bain, Director of the Bureau of Mines (R. II-719; 833). Bain says that Fall had the matter up "actively with him between November 29th and December 1st," the date Fall left for the West, because Bain's bureau was to be charged with whatever duties there were in connection with it in Fall's absence (R. II-833). Before Fall went away, and at the same time he handed Bain Doheny's letter, Fall gave Bain instructions that when the Admiral and the Navy Department sent over the plans he should "proceed to develop a method of carrying out the Navy's wishes in this matter" (R. II-833).

The statement in the Appellants' brief (pp. 31, 201 and 218) that the Doheny letter of November 28, 1921, came into the possession of Dr. Bain "without comment or instructions" is unwarranted. The Appellants can gain but little solace from Finney's repetition to Bain of the instructions which the latter had previously received from Fall before the latter's departure for the West (Appellants' brief, p. 192), since such instruc-

tions were not original with Finney, as counsel would have the Court believe.

These unquestioned facts seem to us to demonstrate that counsel for the Appellants are in error when they say in their brief (pp. 31, 32, 34, and 35) in effect, that Fall had nothing to do with the formulation of the fuel oil storage plan and that the steps taken in early December, 1921, by Director Bain to effect that plan were without the prior knowledge and consent of Secretary Fall. The alleged countermand of Fall's orders by Finney on November 30th (Appellants' brief, p. 213) has no reference to Fall's orders to Bain that the latter should draft a plan with reference to the November 28th letter; but deals with the disposal of the royalty crude oil from the government leases on the naval reserves.

That Bain understood he was to proceed **with Doheny's company** is quite clear from the fact that on or about December 16th Bain went to Finney, then Acting Secretary in Fall's absence, and asked Finney to write Cotter the following letter (Pl. Ex. 67; R. I-342):

"Mr. J. J. Cotter, Pan American Petroleum and Transport Co., 120 Broadway, New York, N. Y.

"DEAR COTTER:—Will you be in Washington any time between now and December 27? If so, please call on Director Bain of the Bureau of Mines who wishes some information from you with respect to the matter discussed in Mr. Doheny's letter of November 28, 1921.

"Please let me know when you will be here.

"Sincerely,

"E. C. FINNEY,

"Acting Secretary."

On the retained file copy of this letter in the Interior Department, there is this notation in Bain's handwriting (R. I-343):

"I asked Mr. Finney to send this since Doheny's bid will be considered through the New York office and I

thought we might get it outlined before we go west. Bain."

When Finney was requested to write the above letter by Bain, Bain had Doheny's letter of November 28th in his hand (R. I-342; II-719). That letter did not go into the regular files, but went into Bain's safe, where it remained until it was found during the course of the Senate investigation (R. II-832, 833). The statement on page 243 of the Appellants' brief that the letter was filed "in the Bureau's safe with and kept in the same manner as other 'papers relating to this case'" is partially true but very misleading. At page 720 of the Record, to which counsel refer, Bain testified on direct examination that it was "kept in the files of the Bureau of Mines, where the original remains until the present date." But, when pressed upon cross examination upon this point, Bain was forced to admit (R. II-832-33) that the letter was placed by him "in the safe in his office, and was not in the general files of the Department, and when the general files were certified to the Senate Committee, this letter was not certified over with them, and was subsequently found." The witness refrains from telling by whom it was found.

Thus it appears that in addition to the relief measures a second business matter of importance, *i. e.*, Doheny's written proposition of November 28, 1921, was pending between Doheny's company and Fall on November 30, 1921, when the \$100,000 transaction, hereafter to be referred to, occurred. Counsel for the Appellants are in error when they state at page 278 of their brief that there was but one matter under negotiation on November 28, 1921, and that was the question of relief from the excessive royalties payable under the July 1921 leases.

Cotter did go to Washington to see Bain about the matter and discussed it with him (R. I-345; II-720, 835, 836, 837) and told Bain that Pan American would bid on the tankage proposition (R. II-834).

Prior to this time Judge Finney, Acting Secretary, had insisted on the taking of competitive bids (R. II-862). There is no justification for the statement on page 191 of the Appellants' brief that Robison and Bain decided upon competition. As a result it was agreed Dr. Bain should go to the California coast and see certain of the oil companies on the question of whether they would be interested in bidding on the proposition. We believe that if Finney had not insisted on this method of procedure, matters would probably shortly have been closed with Cotter and the J. G. White Engineering Corporation teamed up together.

Meantime Robison had asked on November 30, 1921, and received on December 2, 1921, the written opinion of the Judge Advocate General to the effect that it would be legal to exchange royalty oil for tankage, in which it is stated that **"the authority granted 'to exchange' is unrestricted; i. e., the Act does not specify nor limit what may be taken in exchange for the oil and its products."** (Def. Ex. M-4, PP; R. II-697, 701, 981.) This confirmed an earlier oral opinion to the same effect (R. II-981). On the footing of this opinion the Navy had advised the Interior Department that it desired the Interior Department to proceed along the line of using all of the royalty oil not for current use fuel oil, but for oil to be stored in tanks to be built by the contractor (Pl. Ex. 66, R. I-339).

At page 35 of their brief, Appellants' counsel refer to the Navy Council meeting of December 8th, but they fail to tell the whole story of what occurred at that Council meeting. On December 2nd the Judge Advocate General rendered his opinion in favor of the legality of the so-called exchange procedure, and on December 5th, Secretary Denby upon the urgent recommendation of Robison O. K'd the use of royalty oil for this purpose (Def. Ex. PP; R. II-697, 983). At the December 8th Council meeting a form of letter was presented to be sent to the Interior Department, which letter

had been prepared in the Bureau of Yards and Docks, and which called attention to the serious questions as to legality, not so much in any attempt to reverse the Judge Advocate General's opinion, but because of the fact that the legal doubts then existing were so great that probably there would be no bidders for the work. It is significant that this reference in the letter was taken out (R. II-988).

On December 23, 1921, Dr. Bain reported to Secretary Fall what had occurred and what was planned, in a letter (Pl. Ex. 70; R. I-345) as follows:

"DECEMBER 23, 1921.

"The Honorable, The Secretary of the Interior.

"DEAR MR. SECRETARY:—Confirming my telegraphic correspondence with you, I am planning to stop off at Three Rivers the morning of the thirty-first, arriving from Chicago, on the Rock Island, and will leave the next morning for Los Angeles.

"I am going West primarily to consult with the Standard and such other companies as we may determine in conference between us should be taken into account with regard to the tankage plant of the Navy. I have seen Mr. Cotter, and he is getting for us additional data now. I have also had a preliminary conference with the J. G. White Company, which has done a large amount of construction work for the Navy and is also dealing in oil. By the time I reach you I will be able to give you some idea of the character of the contract which should be made in this case. Mr. Finney has, I believe, already told you that the Navy has given the Department a free hand to go ahead."

This letter seems to us to dispose effectually of Appellants' assertion (pp. 38-40, Appellants' brief) that Bain was working independently and not in close conjunction with Fall in December, 1921, on the matter which eventuated in the contract of April 25, 1922.

Bain and Cotter, of the Pan American, went West together, leaving Washington December 28th, 1921 (R. II-837). At Three Rivers Bain reported to Fall what he had done and what he proposed to do on the Pacific Coast and received Fall's approval (R. II-725, 726); Mr. Cotter merely greeted Fall on the station platform at Three Rivers and went on to Los Angeles (R. II-837).

On pages 31, 37, 213 and 238 of the Appellants' brief, counsel say that no action was ever taken by the Government along the lines referred to in the letter of November 28th. They also state that Doheny's letter was not treated as either a bid or a proposition and never entered the realm of negotiation for the contracts here attacked (Appellants' brief, p. 278). That such statements are inaccurate will readily appear from the facts above narrated. The action taken was that Robison was given the letter with the statement that if he O. K.'d it the Government would proceed on the basis of it (Pl. Ex. 34; R. I-163). Bain was given the letter and told to try his hand at drafting a plan (R. II-719, 833). The contract of April 25, 1922 ultimately eventuated, with the preferential right to Doheny's company to leases in Naval Reserve No. 1, and that preferential right eventuated into the lease of December 11, 1922. The contention of counsel that the November 28th letter can not be considered a bid or proposition because of the five months' delay in the execution of the April 25, 1922 contract (Appellants' brief, p. 239) is readily answered by the fact that Judge Finney in early December, 1921 insisted upon competitive bidding (R. II-862) and to comply with such insistence, a semblance of competitive bidding was thereafter pursued.

Another matter which is significant is that Robison testifies that Fall, in October or November, indicated doubt as to the legality of exchanging crude royalty oil for the construction of tankage, dredging and docking facilities at Pearl Harbor (R. III-1076, 1080). Robison fixes as at approximately that

time a statement by Fall to the effect that he was afraid the doubt as to the legality of the procedure would prevent the Government getting bidders to make proposals (R. III-1078, 1079, 1080). As we have above shown, Doheny did make a proposal on November 28th (Pl. Ex. 33; R. I-162). As we have above shown, this was a fulfilment of a statement on Doheny's part to Fall. Admiral Robison attempts to fix by a certain exchange of letters which occurred between himself and E. L. Doheny, Jr., in December, 1921 (Pl. Exs. 68, 69; R. I-343, 344) the date of an interview which he says he had with Doheny, at which Doheny stated that his organization was opposed to his company undertaking the work and that he had decided not to go into it (R. II-996). Robison testifies that he persuaded Doheny that for patriotic reasons his companies ought to undertake the work, and obtained a promise from Doheny that his company would submit a bid at cost (R. II-996; III-1087).

Robison's testimony on this point is made doubtful by the fact that he claims to have reported his interview with Doheny to Fall (R. II-997; III-1087). Of course, Fall was at that time in the West. Director Bain, however, knew of the interview (R. II-834, 835).

Of course, if Robison wanted competition he would have sent for the other prominent men of the oil industry and gotten them to agree at least to do as well as Doheny. The record is bare of any evidence that he ever took the matter up with any other person in the United States on the basis of patriotism and public need. This being the case, he must have known, and Bain must have known, that if the matter was put as a business proposition to any other person or corporation the bid of such person or corporation would be a bid which involved the usual and ordinary profit in a business transaction. They must all have known, therefore, that if Doheny was to be taken at his word, no one could or would underbid him in what appeared on the surface to be

a business competition. The real inducement to Doheny to do the construction work at cost, was, of course his getting enormously valuable leases in Reserve No. 1. That feature of the matter was, as we shall show, a matter of personal negotiations.

It is to be noted that Doheny's bid of November 28th (Pl. Ex. 33; R. I-162) was at cost and was unquestionably submitted before the alleged interview. It is also to be noted that Robison claims he had convinced Fall of the legality of the transaction before November 28th (R. III-1076, 1079, 1080). It is further to be noted that following the Doheny proposition of November 28th negotiations and conferences went on without interruption between Bain and Cotter, who represented the Doheny company (Pl. Exs. 67 and 70; R. I-342, 345; R. II-720, 835, 836, 837), and that in connection with the transaction Cotter left for the West with Bain on December 28th (R. II-837). We suggest that Robison has misplaced the date of the interview, and that it in fact occurred, as Mr. Doheny's recollection would indicate, sometime after January, 1922, when Bain had returned from the West with information that a number of the oil companies thought the proposition illegal and did not care to bid.

3. The money transaction between Fall and Doheny.

This recital brings us, so far as the making of the proposed contract is concerned, down to the end of the year 1921. We must stop here and go back to cover another transaction occurring in the autumn of 1921.

During the autumn of 1921 Secretary Fall discussed with Mr. Doheny his need for certain money to make a purchase of a ranch adjoining his ranch at Three Rivers, New Mexico. This discussion was certainly three or four weeks prior to November 28, 1921 (R. I-210, 211, 267, 268). As a result of the conference Doheny agreed to advance Fall \$100,000 (R. I-210, 268). It was agreed that Fall should let Doheny

know when he needed the money. It is to be borne in mind that the petition for relief of the Petroleum Company was filed on November 22nd (R. I-156), and that the Doheny proposition regarding tankage and further leases to his company was submitted November 28th (R. I-162), and received by Fall presumably on November 29th (R. I-163). On November 29th Fall called Doheny in New York from Washington over the telephone and advised Doheny that he now needed the \$100,000 (R. I-268).

Doheny caused his son to draw this amount in currency out of the bank account of the son at Blair and Company, New York, caused the money, which was in large bills, to be placed in a satchel, and had his son take it and deliver it to Fall in Washington. Fall executed a demand note dated November 30, 1921, and delivered it to young Doheny who returned the note to his father (R. I-211, 212, 268, 269). Fall left on December 1st, went to El Paso, Texas, where he disbursed practically all the money so received in cash, using said cash for the purchase of the very ranch he had mentioned to Mr. Doheny, and to purchase which he told Mr. Doheny he needed the money (R. I-177).

This is the transaction which Appellants in their brief (page 274) characterize as a "*bona fide* loan." On the surface and on the face of the transaction, it was a loan. In fact it was a gift. What was the exact purpose of giving and taking a note covering the transaction will probably never be accurately known. Some motive actuated it. It was not a proper motive and it was not the intent that the note should evidence an obligation of repayment on the part of Fall.

No person of ordinary sense can read the Record made by Mr. Doheny himself and reach the conclusion that this transaction was in good faith a loan and that it was intended the money should be repaid. If it had in fact been a loan about which there was nothing wrong, why carry out the transaction in the extraordinary manner in which it was done?

First, can anyone doubt that Edward L. Doheny had at his command \$100,000? (R. I-266-7.) Why then did he have his son supply the money? (R. I-268.) Obviously so that there should be no record of Mr. Doheny's procuring the cash at the time it was procured.

Second, if as Doheny alleges, he knew that Fall needed the funds to make settlement for a ranch in New Mexico (R. I-210, 268), why did he send the funds to Washington in cash? That he did know Fall was leaving Washington immediately is evidenced by his letter of November 28, 1921, in which he says in the last paragraph: "I suppose you will turn this matter over to First Assistant Secretary Finney, who, with Rear Admiral Robison, may arrange the details of it during your absence, * * *" (R. I-163). How very odd to give a man \$100,000 in cash to carry all the way across the United States, when a bank check or a cashier's check would have been equally available for making a real estate settlement and in every way the equivalent of cash, and would have been wholly safe.

Thirdly, why send the money by a confidential messenger in cash to Washington to reach Fall by the most careful timing exactly on the eve of his departure from Washington?

Fourthly, why was the note torn within a few weeks of the time it was given? (R. I-182, 259, 260, 262, 269.)

Fifthly, why has Fall paid neither interest nor principal upon the note to this day? For, be it remarked, there is no word of testimony in this case to show that Fall has acknowledged the debt since the note was torn, thus making it collectible, or has ever paid either any interest on the note or any portion of the principal (R. I-244, 245, 249).

Sixthly, does not Doheny's own testimony show beyond peradventure that the matter was a gift and not a loan, and that it was never intended that Fall should repay it?

Seventhly, why did Doheny plan to employ Fall at such a large salary that he could apply half of his salary to the

repayment of the note if he did not realize it could never otherwise be repaid by Fall, and if he did not realize that it was in fact a gift and not a loan?

Eighthly, why did Doheny after urging Fall (R. I-237) to make a clean breast of the whole affair change his testimony before the Senate Committee from day to day, first saying that "I" obtained the money upon a check and a few days later saying his son obtained it upon his son's check; first saying nothing about the note being torn and a few days later producing a torn note; and why did he have so much difficulty remembering why he sent cash instead of a draft, and otherwise hesitate and hedge in answering questions, if the entire transaction was *bona fide*?

We need only turn to the language of Edward L. Doheny to be convinced that there is no reasonable explanation of this transaction except that it was made with the full knowledge that it was an improper transaction because his company was then in business relations with the Government which Fall represented, and that the transaction must therefore be concealed; and that the transaction was nothing but a bribe with no intent that it should ever be returned. We quote from the Senate Record, giving the page numbers before each quotation, as follows:

(R. I-237) "THE CHAIRMAN:—At the time you made this loan, Mr. Doheny, you had had relations with the Interior Department with reference to this very naval reserve and had a certain lease?

"MR. DOHENY:—Our company had, Mr. Chairman.

* * * * *

(R. I-222) "SENATOR WALSH, of Montana:—Mr. Doheny, you knew at the time, of course, that Senator Fall was charged with the administration of all of the oil lands of this country in the public domain?

"MR. DOHENY:—Yes."

* * * * *

(R. I-211-12) "MR. DOHENY:—I sent it to him right away I think the next day, or within a couple of days.

"SENATOR WALSH, of Montana:—From New York to Washington?

"MR. DOHENY:—Yes, sir.

"SENATOR WALSH, of Montana:—And the note then went back to you?

"MR. DOHENY:—Yes, sir; the note was brought back to me.

"SENATOR WALSH, of Montana:—How did you transmit the money to him?

"MR. DOHENY:—In cash.

"SENATOR WALSH, of Montana:—How did you transport the cash?

"MR. DOHENY:—In a satchel. The cash was put up in a regular bank bundle and taken over and delivered to him.

"SENATOR WALSH, of Montana:—Who acted as your messenger in the matter?

"MR. DOHENY:—My son.

"SENATOR WALSH, of Montana:—Where did you get the cash?

"MR. DOHENY:—I got the cash from the bank, from Blair & Co.'s bank in New York.

"SENATOR WALSH, of Montana:—And how did you get it from the bank?

"MR. DOHENY:—I cashed a check.

"SENATOR WALSH, of Montana:—Have you got the check?

"MR. DOHENY:—The check I can also send you. I saw the check just before I left."

It might be here remarked that this statement was not truthful and not frank. The Appellants completely overlook this misstatement by Mr. Doheny, as to the source of the \$100,000 in cash, when they state on page 275 of their brief that his testimony before the Senate Committee was a full statement

of the situation, except for his evasion as to the note. The true facts subsequently developed on a second hearing, when Mr. Doheny again appeared before the committee. He there testified as follows:

(R. I-266-7) "THE CHAIRMAN:—Why, Mr. Doheny, you came here to tell this committee that you had loaned Mr. Fall \$100,000 two years ago last November?

"MR. DOHENY:—Yes, sir; a year ago—two years ago last November.

"THE CHAIRMAN:—And you knew at that time that you had the check evidencing the loan or evidencing your drawing the money with which you made it in your possession in California before you started East?

"MR. DOHENY:—No, I didn't have it in my possession, Mr. Lenroot. Before we get any further misunderstanding on this let me tell you. First I borrowed that money from my son. It was his check that was in California.

"THE CHAIRMAN:—You borrowed the money from your son?

"MR. DOHENY:—I borrowed the money from my son and I repaid the money to him with two checks. My account wasn't large enough to produce the money that I was going to loan him, so I repaid him with two checks.

"THE CHAIRMAN:—Did you tell us that the other day?

"MR. DOHENY:—No, sir.

"THE CHAIRMAN:—Why not?

"MR. DOHENY:—Well, I wasn't asked about it.

"THE CHAIRMAN:—Wasn't asked about it?

"MR. DOHENY:—No."

To resume the story let us quote as follows:

(R. I-212) "SENATOR WALSH, of Montana:—How did you come to make this remittance to Senator Fall in cash?

"MR. DOHENY:—That is just what I said a moment ago. I do not remember whether it was the result of his request, or whether it was my own idea of sending it to him in cash to pay for the property. But he was going to use it down in New Mexico, and I thought

perhaps,—well, I do not know exactly how that was as my memory is not good on that point.”

Several weeks after it was given, the note was torn. At the first hearing at which Doheny appeared, on January 24, 1924, he stated that he could not produce the note, as it was lost and he could not find it. It subsequently appeared that the note was in his pocket at the time he was testifying and that he was seeking to avoid the story as to the tearing of the note, hoping that he might produce the torn-off signature at a later date. At this first meeting he testified on this subject as follows (R. I-208):

“MR. DOHENY:—Well, I have the note at home, the note that former Senator Fall gave me for the money, and I remember it by the note.

“SENATOR WALSH, of Montana:—Where is the note now?

“MR. DOHENY:—It is at home. I looked for it the day I started over here. But it was impossible to locate it on that date and there was a question between my wife and myself whether it was in New York in my private box or in Los Angeles. We came to the conclusion that it was in New York, so we gave up looking for it at home, and I decided to look for it in New York when I get there tomorrow or next day.”

When he appeared the second time Mr. Doheny testified as follows (R. I-259):

“MR. DOHENY:—Yes, sir; I came today prepared to make a statement with regard to the note which I got from Mr. Fall when I loaned him the \$100,000. I brought with me all of that note that is in my possession at the present time. I had the entire note in my possession in December, 1921, and my wife and I on the eve of our departure for California were going through some papers, and I found this note in my pocketbook, and I remarked to her that inasmuch as I had made this loan to Mr. Fall to help him out of a difficulty, it would not

much help him out of a difficulty if anything happened to us and the note became the property of executors; it would mean that he would be pressed upon for the payment of it, and that the note instead of being a service to him would be an injury, so I divided the note into two parts. I gave her one part to keep, and I have the other part here to present to the committee (handing paper to Senator Walsh)."

(R. I-262):

"MR. DOHENY:—With the entire note in the possession of my family, whenever we wanted to collect the note we had the note to show that the money was due on the note, but if it should happen to go into the hands of our executors, in case something happened to us, they would not be able to press Mr. Fall and make the loan an injury instead of a help to him.

"SENATOR WALSH, of Montana:—Yes. And where was it that this conversation took place between you and your wife?

"MR. DOHENY:—This transaction took place in the Plaza Hotel, in our rooms at the Plaza Hotel, just prior to our departure for the Pacific Coast.

"SENATOR WALSH, of Montana:—And when was that with reference to the date of the note?

"MR. DOHENY:—That was about two weeks or three weeks after the note was made, after I received the note."

(R. I-264-5):

"THE CHAIRMAN:—Now, Mr. Doheny, your purpose then was if anything happened to you and Mrs. Doheny that this \$100,000 should be a gift to Mr. Fall?

"MR. DOHENY:—No; my purpose was that he should not be pressed for the payment until he was able to pay it.

"THE CHAIRMAN:—Well, if anything happened to you or Mrs. Doheny how could he ever be pressed for payment after what you had done to the note?

"MR. DOHENY:—If anything happened to us the two fragments of the note would still remain in our posses-

sion, wherever we were with our bodies, if we were in a railroad wreck, and our heirs, my son would have gotten hold of the pieces and he would have known what they meant, but executors wouldn't; they would force the payment of the note upon him. My son knew that the note was given for the money, and he knew it was Mr. Fall's intention to pay the note, and we believed that he could get a new note from Mr. Fall by asking for it. That is what is in my mind, that he could have gotten a new note by saying to Mr. Fall, 'The note that you gave to my father was lost when they were in that wreck, and we want a new note for it,' and we believed that Fall would give him a new note, and in case we were all killed in a wreck, why of course it would have been a legacy to him."

On the question of any entry of this as an indebtedness on his books he testified as follows (R. I-272):

"SENATOR ADAMS:—So there was no entry made on your personal accounts at that time in reference to this note or the money that you sent to Secretary Fall?

"MR. DOHENY:—No, sir."

On the question of repayment of the note Mr. Doheny stated as follows (R. I-244-5):

"THE CHAIRMAN:—Mr. Doheny, what are your expectations with reference to the repayment of this loan?

"MR. DOHENY:—Well, I will tell you frankly now—I don't know whether this has any connection whatever with the investigation—but I expected that if the Senator did not sell or turn over that land that later on I might employ him in connection with our affairs in Mexico, with which he is very conversant, and I would pay him a salary large enough of which he could pay about one-half to apply on the note, and pay it off in five or six years. And that was my expectation.

"THE CHAIRMAN:—You had that in mind at that time?

"MR. DOHENY:—Yes, sir.

"THE CHAIRMAN:—If Mr. Fall does not enter your employ, do you ever expect to press him for payment of the note?"

"MR. DOHENY:—Well, I don't know. If Mr. Fall is well enough and in good health, I expect he will enter my employ.

"THE CHAIRMAN:—You do expect that?"

"MR. DOHENY:—Yes, sir."

(R. I-247):

"SENATOR PITTMAN:—Mr. Doheny, at the time you discussed the making of this loan to Senator Fall, was there any discussion with regard to repaying you the money?"

"MR. DOHENY:—No, sir.

"SENATOR PITTMAN:—He did not say he thought he could ever repay it?"

"MR. DOHENY:—No, sir."

(R. I-249-50):

"MR. DOHENY:—I do not know that I had that particularly in mind. I cannot say just what came into my mind at that time.

"SENATOR PITTMAN:—Well, you had in mind employing him and his repaying this note out of his employment?"

"MR. DOHENY:—Yes, sir.

"SENATOR PITTMAN:—And he had talked to you about resigning from the job of Secretary of the Interior?"

"MR. DOHENY:—Yes, sir; but I did not know how soon he would retire, whether he would stay his term out or not. We never discussed the length of time that he would remain in the Interior Department."

On the question of Mr. Doheny's own knowledge of the probable effect of such a transaction on Secretary Fall's official action, Mr. Doheny stated the following (R. I-214):

"SENATOR WALSH, of Montana:—I can appreciate that on your side, but looking at it from Senator Fall's side it was quite a loan.

"MR. DOHENY:—It was, indeed; there is no question about that. And I am perfectly willing to admit that it probably caused him to have such a feeling that he would have been willing to favor me, but under the circumstances he did not have a chance to favor me. He did not carry on these negotiations. That is the point I would like for you to understand; that Senator Fall, in my opinion, was not influenced in any way by this loan, because the negotiations were carried on by men who were not under his control."

(R. I-232):

"THE CHAIRMAN:—I am not asking you about the question of collusion; I am examining you concerning your own statement, that by reason of your accommodation to Mr. Fall you think that had he a discretion to exercise he might have been more likely to exercise it in your favor.

"MR. DOHENY:—Why, I admit that.

"THE CHAIRMAN:—Very well.

"MR. DOHENY:—I don't think he is more than human."

It should be added that in a number of places Mr. Doheny stated that he had no personal relations with Secretary Fall concerning the contracts and leases (R. I-214; I-230; I-232). We have above shown certain personal negotiations and shall below elaborate on others which show that he was in touch with Secretary Fall throughout the transaction.

There is another matter which must not be overlooked in the transactions of these two men. It is perfectly evident from Mr. Doheny's statement to the Senate Committee that there was an understanding that the Pan American Company should employ Mr. Fall upon his leaving his office of Secretary of the Interior (R. I-245):

"MR. DOHENY:—Well, I will tell you frankly now—I don't know whether this has any connection whatever with the investigation—but I expected that if the Senator did not sell or turn over that land that later on I might

employ him in connection with our affairs in Mexico, with which he is very conversant, and I would pay him a salary large enough of which he could pay about one-half to apply on the note, and pay it off in five or six years. And that was my expectation.

"THE CHAIRMAN:—You had that in mind at that time?

"MR. DOHENY:—Yes, sir.

"THE CHAIRMAN:—If Mr. Fall does not enter your employ do you ever expect to press him for payment of the note?

"MR. DOHENY:—Well, I don't know. If Mr. Fall is well enough and in good health I expect he will enter my employ.

"THE CHAIRMAN:—You do expect that?

"MR. DOHENY:—Yes, sir."

(R. I-248-49):

"SENATOR PITTMAN:—And you have testified that you expected it would be paid probably by your employing Senator Fall and taking it out of his salary?

"MR. DOHENY:—In case he did not find it possible to pay it out of the profits of the property; in case he was not able to repay it any other way.

"SENATOR PITTMAN:—You did not expect him to go into your employ while he was Secretary of the Interior, did you?

"MR. DOHENY:—No, sir.

"SENATOR PITTMAN:—**You were to employ him after he ceased to be Secretary?**

"MR. DOHENY:—**After he ceased to be Secretary of the Interior.**

"SENATOR PITTMAN:—Was there anything said with regard to him resigning as Secretary of the Interior before his term was up?

"MR. DOHENY:—Yes, sir; he often spoke of that. He often said he was not going to remain very long."

(R. I-249-50):

"SENATOR PITTMAN:—Well, you had in mind employing him and his repaying this note out of his employment?

"MR. DOHENY:—Yes, sir.

"SENATOR PITTMAN:—And he had talked to you about resigning from the job of Secretary of the Interior?

"MR. DOHENY:—Yes, sir; but I did not know how soon he would retire, whether he would stay his term out or not. We never discussed the length of time that he would remain in the Interior Department."

It is perfectly clear from the above that there was an understanding that Fall would enter the employ of the Appellant Company and might liquidate his indebtedness out of the salary he would then receive if he could not do it in any other way. In support of their unwarranted contention that there was no such agreement or understanding between Doheny and Fall (Appellants' Brief, pp. 276, 292), counsel refer to the testimony adduced by the Chairman (R. I-245) but ignore Doheny's admission to Senator Pittman that Fall was to be employed "after he ceased to be Secretary of the Interior" (R. I-248-49).

The cases which are cited under a subsequent heading of this brief show clearly that such an agreement and arrangement is fraudulent, against public policy, and vitiates any contract made. It not only vitiates the contract for repayment by the taker of the money, but vitiates any dealings had on the footing of that arrangement or understanding, or following it, between the United States and the giver of the money. If there were no other thing in this case except the understanding that Fall was to enter the employ of Doheny's company in gainful occupation, that thing, in and of itself, would vitiate every subsequent transaction between Doheny or the company which he represented and for which he was speaking, with Fall, representing the United States of America, made or intended to be made through the actual

or potential influence of Fall or which he was supposed in any way to forward. And this would be equally true whether Fall were actually an employee of the United States or merely to use his influence with other employees of the United States in the premises. The authorities cited later in this brief so hold.

Counsel attach great significance to the fact that Fall's note was carefully preserved by Doheny after its mutilation and to the further fact that Fall was not informed of its mutilated condition (Appellants' Brief, pp. 276-77). Such facts evidence an intention on Doheny's part to retain control over Fall through the medium of his outstanding \$100,000 obligation; and cannot be urged as proof of the *bona fides* of the transaction. Counsel also state that public officials who are bribed do not draw up notes in their own personal handwriting and give them to the briber (Appellants' Brief, p. 277). That would seem to depend largely upon whether the subject matter of the bribe, as here, lay *in futuro* and upon whether the briber wished some tangible means of control over the future conduct of the bribed. Finally, counsel contend that a note constitutes as much evidence of the transaction as a check (Appellants' Brief, p. 278). With this statement we strongly disagree. Had a check been given, there would have been a record of the transaction in Doheny's checkbook, in his bank statement and in the records of the bank. The testimony is uncontradicted that Mr. and Mrs. Doheny took great care that the note should not appear in their personal accounts and papers; and inasmuch as the cash was drawn from the bank account of their son, obtaining the evidence was made most difficult.

Mr. Doheny, in his statement to the Senate Committee, several times said that he had never discussed the leases or contracts with Fall; that all of the transactions were had between Fall's subordinates and the subordinates of Doheny in the Pan American Company, and that therefore while the

transaction might naturally influence Fall it could not in fact have had that effect, as he had nothing to do with these matters (R. I-214, 230-2). We have above referred to Fall's great activity in behalf of the Pan American Company at or about December 1, 1921.

It remains to show his close personal touch with the transactions thereafter and that in every case he kept his hand upon the lever, and that no matter could go through or was allowed in fact to go through without his personal participation and control.

4. The making of the contract of April 25, 1922.

(a) Competitive Bidding.

Early in January, 1922, Bain arrived at Los Angeles and took up the Pearl Harbor proposition with Doheny, Cotter, and various directors of the Pan American Company (R. II-727, 837-8).

The Standard Oil Company was approached. Why? If a contract were ultimately to be awarded to Pan American and it appeared that Standard had not been approached on the subject, there would have been some pretty difficult explaining to do. The answer came promptly that Standard would not be interested in the construction end of the contract (R. II-729).

And yet from January to the middle of April, when the bids were submitted, a sort of pretense was kept up that Standard would probably bid. Robison states that when Bain got back to Washington in January, 1922, he told Robison that Standard's objections were of such a character that they could be met and that he, Bain, expected Standard to submit a bid on construction (R. III-1083). Of course this is wholly contrary to the fact, because Standard's objections were fundamental and Bain knew it (R. II-844-45).

On March 3 Black sent Bain a copy of the adverse opinion of Mr. Sutro, counsel for Standard (Pl. Ex. 95; R. I-386).

It did not take a lawyer to see that Mr. Sutro's objections were fundamental and were to the method of contracting because it would constitute, in his judgment, a violation and evasion of the Act of June 4, 1920. (See opinion, Pl. Ex. 51; R. I-296.) And yet on March 4, 1922, Bain writes Black (Pl. Ex. 96; R. I-387) advising that he is having Sutro's opinion studied and that he expects to be able to devise a form of bidding which will meet the objections raised by Sutro. Dr. Bain says the study he had in mind was a study by Secretary Fall and Assistant Secretary Finney (R. II-842-3). But they had already studied the matter and given opinions, if the testimony is to be believed.

It is furthermore clear that Bain's statement that he expected to be able to devise a form of bidding which would meet the objections was untrue, because on March 7th an invitation for bids was issued on exactly the same theory of a bid in barrels of oil, which had been the form of bid required by the earlier invitations.

Why this pretense that Standard was to be a real competitor with Pan American when it was entirely clear that it would not be? Again, at the end of March, Standard wired the Interior Department (Pl. Ex. 93; R. I-384) indicating a desire to bid on a different sort of proposition. It was promptly advised that it was too late to change the proposition and it would have to bid on the project according to the invitation of March 7th (Pl. Ex. 94; R. I-384).

What is the story with regard to General Petroleum? The matter was laid before it. The answer came promptly from its attorney that the plan was illegal in his judgment and that his company would not bid. Bain met this attorney, Mr. Weil, in California (R. II-740). He reported his objections and his position to Fall (R. II-743, 842), and we think it clear he reported them to Robison (R. II-743), although the Admiral's testimony is very unsatisfactory on this point (R. III-1083, 1084). In his deposition in the Mammoth

oil case, he said he knew, there were two attorneys who objected. At this trial he insisted that he only knew of one,—Sutro (R. III-1083). At all events, it was or ought to have been clear that General Petroleum would make no bid.

The matter was taken up with Pacific and Associated (they are affiliated companies). Why? They constitute one of the large oil groups in California. If a contract had been made without going through the form of submitting it to them it is entirely clear that the most severe censure would have been passed upon the transaction. These companies, as the record here shows, have always been good neighbors to the United States in the Naval Reserves and have sought in every way to cooperate with the Government in the conservation of its naval oil (Pl. Exs. 15, 16, 17, 18, 19, 20, 21, 22, 76, 77, 78, 144, 146, 148, 149, 150, 152, 153; R. I-138-45, 353-56; II-587-593). As was to be expected, therefore, their attitude was that if they could be of service in the matter they would like to do so. They were very much at a disadvantage, however, in getting data and knowing what was going on, as shown by Mr. McLaughlin's letter of March 9, 1922 (Def. Ex. XX, R. II-754), wherein he says:

"I have your very interesting letter of March 1st and am very much obliged to you for it. Not being familiar with the details of how this matter is being worked out in Washington, we are naturally more or less perplexed at this end."

They came to the conclusion that the transaction was unauthorized by the Act of June 4, 1920, and that they could not bid except upon condition that Congress would pass legislation approving the form of contract. This they advised Fall and Bain (R. II-844). It was therefore known first, that if they made any bid they would make it on a basis which involved a profit and that their bid would undoubtedly be higher than the Pan American's bid, even though the Pan American did make a profit, because as the Record shows

Pan American and J. G. White Company, its agent, had gotten data and been in touch with officials of the Government concerning its bid so frequently and in such wise that it had a clear inside track in any bidding; secondly, because the Associated bid would be conditioned, as above set forth (R. II-844), and could be of course discarded on that ground if made.

Dr. Bain in the letter of March 30, 1922 (Pl. Ex. 247; R. II-846), writes Mr. McLaughlin of the Associated Company to come to Washington and be present at the time the bids are received. In this letter he makes this interesting suggestion:

"It also occurs to me that it is entirely possible that even if some other company is the successful bidder on the project as a whole you might be able to make a private arrangement to get control of the crude oil from Reserve No. 2, which I gathered from our conversations is the thing you are most interested in." (R. II-846.)

It is further interesting to note that exactly what Bain suggested as above did happen, because as soon as the Pan American Company became the taker of the royalty oil of the Government under the contract of April 25, 1922, it resold this royalty oil at a premium or advance in price to the Associated Company (R. II-845, 859; III-1132).

The only other company with whom the matter was taken up in California by Bain in January was the Union Oil Company. The record with regard to this is indeed peculiar. Bain says that he got the "impression" that this company would not be interested (R. II-742). He stated that plans were not left with the officials of this company for the reason that it seemed to him improbable that they would be sufficiently interested to warrant it (R. II-742).

He states that this was the reason that when invitations were issued none was sent to the Union Oil Company. Robison testifies that Bain reported to him that the Union Oil Com-

pany was anxious to bid and that the Government could undoubtedly get a bid from that company if it wanted one, but that Bain advised against asking that company to bid on account of its being foreign-owned (R. III-1084). Robison's testimony on this point is that Bain said that a bid could be gotten from the Union, but it was not wanted because they were British owned in a large measure (R. III-1084). He did not tell Robison that the Union had given him the impression that they did not want to bid; Robison got quite a different impression (R. III-1084).

The fact as proved is that the Union Oil Company was not foreign owned at all (R. III-1167, 1168). It is further in evidence, that when it became known that the contract of April 25th had been made the Union Oil Company protested at not having been given an opportunity to bid (Pl. Ex. 213; R. II-653). How does this comport with Bain's statement above quoted that he had the impression that they were not anxious to bid (R. II-742), and how does Bain's statement comport with Robison's testimony that Bain told him Union was anxious to bid (R. III-1084)? This is the story of the exclusion of Union from the bidding.

J. G. White Engineering Corporation was consulted in December by Bain, apparently because of the engineering and construction work involved in the project (R. II-722-3, 839). Gano Dunn, its president, expressed interest, and thought that perhaps his company could handle the royalty oil (R. II-724, 840). He soon found out that he could not dispose of it (R. II-724). This meant that he was out of the transaction unless his company could be teamed up with some oil company. His company was Bain's first choice as an engineering company. It is interesting to note that Bain immediately went about forming a coalition between the favored oil company, Pan American, and the favored engineering concern, J. G. White Company (Pl. Ex. 72; R. I-347; R. II-746-7). He was successful in this, thus again giving Pan American the

edge on all others in the supposed bidding. He went to Colonel Black, of Ford, Bacon & Davis, in San Francisco, not because he was anxious to get into touch with Black, but because Mr. Storey of the Standard Oil Company, to whom Bain submitted the plan, suggested that as the matter involved a construction feature it would probably be wise for Bain to take the matter up with Black (R. II-729, 730, 841). Bain could not, without showing bad faith, refuse to do so, and he did so.

Black's company, however, was associated with two companies, the Standard and the Associated, neither of which made a bid in accordance with the invitations.

Two engineering concerns late in the proceedings heard of the project. As shown by the letter of Dunn to Cotter of April 3, 1922 (Pl. Ex. 257; R. II-931), Pittsburgh-Des Moines Company heard of the proposition, because J. G. White Engineering Company was asking Pittsburgh-Des Moines to become subcontractor for tanks. Late in the proceedings Pittsburgh-Des Moines asked for plans and specifications and got them (R. II-770-71, 855).

In some way Foundation Company heard of the proposition, and late in March got plans and specifications (Def. Ex. YYY; R. II-881; R. II-770, 855). It is quite obvious that neither of these engineering concerns was able to make any arrangement to dispose of the royalty oil and therefore neither of them was ever heard from again in the matter. Other engineering concerns would have been interested and would have attempted to arrange for the sale of the royalty oil and to make a bid, as is shown by telegrams of Chicago Bridge & Iron Company and Graver Corporation (Pl. Exs. 106 and 112; R. I-399, 402).

It results from the above that it was known that but one concern would bid—the Pan American (R. II-844, 845).

It was Judge Finney, Assistant Secretary of the Interior, who insisted upon a form of competition for the Pearl

Harbor contract (R. II-862, 863). When Bain arrived home from the West in January, 1922, he set about preparing invitations for proposals (R. II-512, 744). These invitations in effect called for a cost-plus bid. (Pl. Exs. 73, 74 R. I-349, 350-53.) Admiral Gregory of the Navy objected to cost-plus contracts (Pl. Ex. 79, R. I-356, 513), and as a result the invitations which had been sent on February 15th to the Standard, Pan American, Associated, Ford, Bacon & Davis, and J. G. White Engineering Company, were withdrawn, and a modification of them made (Pl. Exs. 80, 81, R. I-358). This modification was found to be unworkable, and new invitations were sent on March 7th to the three oil companies, Standard, Associated and Pan American, and to two engineering concerns, J. G. White Engineering Company and Ford, Bacon & Davis (Pl. Exs. 91, 92, R. I-373, 374, 375-83), it being then understood that J. G. White Engineering Company was definitely teamed up with the Pan American Company and that Ford, Bacon & Davis would be teamed up with Standard or Associated.

(b) *The Alternative Proposal.*

The two propositions on which alternative bids were permitted were these: the bidder was permitted to submit on the **construction feature** of the proposed contract either a lump sum bid for the whole, or a bid based on firm lump sum sub-contracts for at least two-thirds of the work and some other sort of supplementary bid (*e. g.*, a yard or foot price per unit of work) for the remainder. (Pl. Ex. 92, R. I-375; II-857, 858.) The other alternative arrangement permitted the bidder to submit on the **fuel oil feature** of the proposed contract either a bid stated in ratio of barrels of fuel oil to barrels of royalty oil, or to state the relation in other terms [*e. g.*, one dollar's worth of fuel oil at market, for one dollar's worth of crude oil at posted field price (Pl. Ex. 92, R. I-379, 380)]. **These permitted alternatives had nothing whatever to**

do with proposed leases or preferential rights to lease (R. II-857-858). They had merely to do with construction items or exchanges of oil (R. II-857-59).

Although informed just prior to the time bids were opened that the Pan American would submit a complete bid and an alternative bid, Bain had not expected an alternative bid involving a preferential right to further leasing in the Reserve (R. II-856, 858). Cotter of the Pan American had discussed alternative bids with Bain and told him that he wanted an opportunity to put in such a bid and said he would do so (R. II-856). Mr. Dunn requested that "the alternative be made as wide open as possible in the sense of giving the bidder as much latitude as possible" (R. II-856).

(c) The Award of the Contract.

Under the invitations bids were to be submitted April 15, 1922 (R. I-381). Fall intended leaving for Three Rivers on April 13, 1922. Before he left he asked Judge Finney and Dr. Bain why the transactions could not be closed, and when they told him that the bids were not to be opened until April 15th he expressed dissatisfaction with the delay, and suggested that it would be possible to close the contract by private negotiation (R. II-772, 847). This suggestion is overlooked by the Appellants, when they state at page 45 of their brief that Fall had nothing to suggest to hasten the consummation of the contract. Finney and Bain explained to him that this could not be done in view of the invitation for bids (R. I-392; II-772, 773, 847).

We find, further, that there is every presumption Fall knew all that Bain knew on the subject of the bids which were to be expected (R. II-743, 744, 842). Bain knew that Doheny would bid (R. II-743, 744; III-1087-88). He knew that Associated would not bid except conditionally (R. II-844); that General Petroleum would not bid (R. II-842); that Standard Oil would not bid (R. II-842, 844); and that

Union Oil had not been asked to bid (R. III-1087). But lest there might be any chance that the contract would get away from the Pan American Company Fall left explicit word that he was to be consulted before a contract was closed (R. II-849), and it was his final O. K. given by telegram (Pl. Ex. 123; R. I-424) that permitted the contract to be closed. The Appellants are inaccurate in their statements (pages 46, 49-50) that the only instructions given by Fall were that the bids were to be opened and examined.

The bids were opened April 15th, and they disclosed what might have been expected. Standard, as was to be expected, submitted only a bid for the exchange of royalty oil for fuel oil, not being willing, on account of illegality, to bid on the construction work (Pl. Ex. 116; R. I-408). Associated made a bid for the exchange of fuel oil and for the construction work, **but expressly conditioned it upon the prior approval by Congress of the plan** (Pl. Ex. 117; R. I-410).

Pan American submitted two proposals, designated Proposal A (Pl. Ex. 118; R. I-411-412) and Proposal B (Pl. Ex. 118b and Exhibit B of Amended Bill; R. I-36, 411, 412), respectively. These proposals contained certain formulae for the calculation of the exchange values of oil and construction, which confessedly had been worked out and submitted prior to the bidding, to the Bureau of Mines of the Department of the Interior (R. II-769, 770, 861, 862). The Record indicates that there were many conferences and much discussion between representatives of the Pan American and its associate, J. G. White Engineering Corporation, and officials of the Bureau of Mines and of the Bureau of Yards and Docks of the Navy before the bid was actually put in (R. II-860). We think the record does not support the statements found in Appellants' brief (pp. 45, 285) that other engineering concerns had similar conferences with Bain and had the same chances as the Pan American Company had.

Proposal A of Pan American named a lump sum in barrels

of royalty oil for the fuel oil and the construction of the tankage, wharfage, etc. covered by the specifications (Pl. Ex. 118a; R. I-411). Proposal B of the same company was also a lump sum proposal covering the same matters and was some \$235,000 less in amount than Proposal A, and also stipulated that if the Company could do the construction work for less than a given figure, which was the figure used in making up this lump sum proposal, it would credit the Government the amount of any such saving in the construction work. (Pl. Ex. 118b and Ex. B of Amended Bill R. I-36, 411-12.) **The other and vital difference between Proposal A and Proposal B was that Proposal B was conditioned on the Government's granting to the bidder a preferential right to any leases for oil and gas thereafter granted by the Government in Naval Reserve No. 1 (R. I-40).**

The bids as scheduled were referred to Mr. Ambrose, of the Bureau of Mines, for report (R. I-412, II-515, 775), and he reported (Pl. Ex. 119; R. I-412) what was perfectly obvious, that Proposal A was lower than the Associated's bid; that Proposal B was still lower than Proposal A, but that Proposal B was conditioned upon the grant of a preferential right. Fall being absent, conferences were had between Finney, Bain, Robison and Ambrose, and it was reported by telegram to Fall that the Pan American's Proposal B was the lowest bid, and that it was recommended that the contract be awarded to Pan American (Pl. Ex. 120; R. I-419, 420). This telegram requested Fall to authorize the closing of the contract with the Pan American Company. Secretary Fall, before he left for the West, gave instructions to Bain that no contract was to be closed without his prior approval (R. II-849).

Upon receiving Fall's authorization, Judge Finney wrote a letter on April 18th advising Pan American that its Proposal B was accepted (Pl. Ex. 122; R. I-421, 422). Said letter accepted Proposal B as it stood and was signed by Judge Finney alone.

(d) *The Preferential Right.*

It is interesting to note what the attitude of the Government officials was towards the proposed preferential right. Robison testified that the consideration given to the terms of the proposed contract may have lasted a few hours (R. III-1097-8). Bain testifies that when Cotter claimed that the preferential right was not of much value he, Bain, "joshed Cotter" (R. II-864). Bain says he considered the preferential right of very substantial value (R. II-864). As we shall hereafter point out, Robison apparently thought the preferential right of little consequence, but learned to his sorrow in December that it was vital and important (R. III-1097, 1132, 1135-36).

In Ambrose's report of April 17th he recommends that the preferential right shall be limited to what may be roughly designated as the eastern half of Reserve No. 1, and further recommends that certain language shall be used in the contract with regard to the preferential right (R. I-418-19). The preferential right was so limited in the contract, although there is a strange lack of evidence of what negotiation took place after Judge Finney's unconditional acceptance on April 18, 1922, of Proposal B, and before the execution of the formal contract whereby this change was effected. On the other hand, we submit that Mr. Ambrose's careful suggestions as to the wording of the preferential right were not carried out in the language of clause XI of the contract (R. I-34, 35).

Several matters are to be noted in connection with the granting of this preferential right:

(1) It put the entire power to agree to the terms of any leases in this large portion of the Reserve in Secretary Fall alone. It took from the Navy Department and Secretary Denby any power whatsoever with regard to the leasing or the terms upon which leasing should be done in that portion of the Reserve.

(2) It gave the Pan American Company the exclusive right, if it were willing to agree with Secretary Fall alone as to royalties, to any such leases; but if it did not so agree, it left the Pan American open to have equal advantage with the best bidder in competition for such leases. It thus effectually destroyed the possibility of any competition for such leases.

There was no competition between the bidders as to this preferential right. There was no advice to bidders that such a preferential right, or any right to oil leases, would be considered in the opening of the bids. In all of the invitations sent out there had been a provision that if royalty oil from existing leases did not accrue at a certain rate the Secretary of the Interior would consider the advisability of granting further leases in order to produce royalty oil at a more rapid rate (Pl. Ex. 92; R. I-375, 379). Be it noted, however, that this was left as a matter of discretion with the Secretary, was intended to be an assurance to the contractors that they would not be too long delayed in receiving payment, did not indicate that such leases would be granted to the bidders for the storage construction, and had no element of preference of one bidder over another.

It is to be noted further, as we have above shown (pp. 56, 57 this brief) that the invitation of March 7th did provide for certain alternative proposals, which had not the faintest relation to any leasing or any preferential right to leases.

The damage was practically and in effect done when Proposal B was accepted. Naval Reserve No. 1 was in effect pledged to the Appellant Petroleum Company. Mr. Doheny's prophetic letter of November 28, 1921, concerning lands "to be leased to us" was in the way of fulfillment. It only remained for Secretary Fall to see that it was actually carried to fruition.

(c) *The Execution of the Contract.*

The proposal having been firmly accepted, Mr. Cotter, as above stated, protesting that the preferential right was not of great value to his company, stated that he desired a definite commitment by the Government to lease certain areas to his company within one year from the execution of the contract (R. II-529, 530, 779, 780-82, 864). This matter was discussed by Finney, Bain, Robison and Ambrose, and as a result on April 18, 1922, a letter was prepared committing the Government to make these leases. This letter was dated April 25, 1922, the day on which the contract was actually executed (Pl. Ex. 125 and Ex. E of Amended Bill; R. I-65).

Cotter also raised a question as to the validity of the transfer of power under the Executive Order from Secretary Denby to Secretary Fall and stated that his company would not take the contract unless it were executed by both Secretaries (R. II-529, 778, 779, 780, 1006). This matter was referred by telegram to Fall (Def. Ex. FF; R. II-525) and he replied by telegram to the effect that it would be well to have Secretary Denby made a party (Def. Ex. GG; R. II-526). This was accordingly done.

On April 20, Ambrose was sent with the papers and data to Three Rivers, New Mexico, to submit the same to Secretary Fall and procure his consent to the execution of the agreement as then proposed (R. II-780, 867). He arrived at Three Rivers April 23d and on that date Fall wired that he had arrived and that as to both contracts Finney should go ahead and execute them (Def. Ex. II; R. II-526, 527). The statement in the Appellants' brief (p. 287) that Ambrose's change in the language of the preferential right was not even reported to Fall does not agree with Bain's testimony that Ambrose was sent to Fall at Three Rivers to explain, *inter alia*, the definition of the preferential right to lease (R. II-780).

Thus, without competitive bidding, a construction contract involving millions of dollars was made by the United States Government, the administration of a large portion of the Naval Reserves was by covenant irrevocably surrendered by the Secretary of the Navy to the Secretary of the Interior and the United States was committed to lease at the behest of the Secretary of the Interior about one-half of Naval Reserve No. 1.

So far as appears from the record, at the time the contract of April 25, 1922, was under negotiation, and at the time it was executed, neither Robison, Bain, Ambrose nor Finney had any information that it was intended by Fall or any one else, at any near date to execute leases on the remaining unleased portions of Naval Reserve No. 1, except for two comparatively small leases stipulated in the covering letter of April 25, 1922 (Ex. E of the Bill of Complaint; R. I-65). What Fall and Doheny knew and thought on that, they, of course, have not disclosed by testimony.

The record does not disclose what all the parties had in mind so far as concerned the control of the contract of April 25, 1922. By letter of May 5, 1922, Finney to Denby (Pl. Ex. 129; R. I-433) it is disclosed that the Interior Department was to be responsible for the entire control of the contract and that the Navy Department was merely to supply assistance to the Interior Department in that matter. The letter discloses that the entire responsibility was understood to rest with the Interior Department. This letter, to which no reference is made by the Appellants, effectually answers the statements appearing on pages 82, 83, 84 and 249 of Appellants' brief, and shows that Naval officials who supervised the performance of the contract acted merely as delegates of the Secretary of the Interior. This letter also refutes the contention of counsel (Appellants' brief, p. 289) that the mere joinder of Denby as a party signatory to the contract of

April 25, 1922, concededly placed him in control of the situation.

Late in May, 1922, application (Pl. Ex. 127; R. I-432) was made for a lease under the letter of April 25, 1922 (Exhibit E of the Bill; R. I-65), and said lease was granted and is the lease of June 5, 1922 (Exhibit F of the Bill; R. I-68).

5. The making of the contract and lease of December 11, 1922.

(a) Doheny's Plan.

Admiral Robison, soon after the execution of the April 25th contract, busied himself with increasing the plans for naval fuel reserve storage at Pearl Harbor and put in train in the Navy Department a study of the needs of the Navy for additional fuel oil storage on the Pacific (R. II-1012).

Meantime the price of oil was steadily declining. There was a flood of crude oil coming on to the market and a great over-production thereof (R. II-582, 599). This gave occasion to the Pan American Company to communicate with Secretary Fall requesting that they be permitted to curtail production under such leases as they then held in Government lands in the California reserves. Cotter wrote to this effect to Fall on July 28, 1922 (Pl. Ex. 140; R. II-582). Fall immediately granted the request to curtail production and not only permitted such curtailment by the Pan American Company as lessee, but by other lessees of the Government in the Naval Reserves (Pl. Exs. 141, 142, 143; R. II-584-6).

In his letter to Fall, Cotter makes these significant statements: "We are seriously contemplating the adoption of a plan which should bring better prices for this oil, if and when the plan can be consummated." * * * "We believe that if this oil **can be safely stored underground**, that better prices which the future should develop will result and bring

out the liquidation of contract prices in approximately the same length of time with a much smaller quantity of oil.

We hope that you will see your way clear to authorize us to suspend operations both of drilling or production, or either, to such extent as we may find it necessary in connection with the study of our proposed plan, until such time as said plan can be fully developed and submitted to you for your study and approval. **We hope to be able to submit this plan within ninety days.**" (R. II-583-84.)

It is a curious fact that Fall's reply to the above letter was sent to Doheny and not to Cotter (R. II-585). On September 6, 1922, Doheny wrote to Fall again about this plan (Pl. Ex. G-5; R. III-1155).

The "plan" was submitted within ninety days. As to just when it was submitted there is some discrepancy in the testimony. Prior to the trial, Bain stated that he had seen it as early as August, 1922 (R. II-868); but at the trial he testified that he did not see it until October, 1922 (R. II-868).

As to how the plan was submitted, there seems to be no doubt. Doheny submitted the plan to Fall. How long it remained in the possession of Fall is not known; but Fall handed the plan to Bain and told him to take it up with the Admiral, meaning Robison (R. II-789, 868). Fall expressed his approval of the plan to Robison. The latter testifies "That when 'this proposition was originally brought to' his attention 'by Secretary Fall,' as stated in the foregoing memorandum, Secretary Fall told the witness that Mr. Doheny was much concerned over the state of the oil market in California, and had some sort of a proposition to advance looking toward the stabilization of prices that might be made to the Government's advantage, as well as to his own; witness told Secretary Fall that anything that came 'to our advantage' was of interest to witness and that is about all there is to it, because the witness was not furnished with any details" (R. II-1021).

Robison further testified that "the plan for increased storage facilities was purely a naval matter, but Secretary Fall did say to witness when he discussed Mr. Doheny's plan with regard to Naval Reserves that he thought that plan was valuable both to the Navy and to Mr. Doheny, or would prove valuable to both of them" (R. III-1137). Fall's approval of Doheny's plan is ignored by counsel, although his instructions to Bain are stated at length. (Appellants' brief, pp. 66-67, 201, 289).

Cotter called on Bain and asked what had become of the memorandum (R. II-790). In late October, 1922 Doheny called upon Robison and discussed the proposed plan (Def. Ex. R-4; R. II-1015). As a result of that discussion, the memorandum originally submitted by Doheny was enlarged and resubmitted to Robison under date of November 6, 1922 (Pl. Ex. 158; R. II-598; R. III-1022).

Counsel are certainly wrong in their statements on pages 63 and 64 of their brief that Fall had said nothing which resulted in the adoption of the plan of November 29, 1922, and the lease of December 11, 1922. The only testimony which we have on the subject is that Fall approved Doheny's plan and so stated to Robison (R. II-1021; III-1137).

An inspection of Doheny's enlarged memorandum (Pl. Ex. 159; R. II-598) will show that his plan contemplated the leasing to his company of large unleased portions of Naval Reserve No. 1 (in his memorandum he calls it Naval Reserve No. 2, but it is obvious that he means Reserve No. 1; R. II-602, 603). Robison so understood it (R. III-1127). In consideration of this leasing he proposed to do certain things for the Navy in the way of arranging fuel reserve storage for naval oil. The plan also contemplated that the Pan American Company should not only become lessee of this additional territory, but would continue to receive as vendee the Navy's royalty crude oil for a considerable period after the construction program at Pearl Harbor should be

completed. Such a provision is to be found in Article II A of the contract of December 11, 1922 (R. I-48). The statement by counsel that the entire project embraced in the December 11th contract and lease originated exclusively in the Navy Department and that no claim or contention to the contrary is made (Appellants' Brief, pp. 193-94 and 280) is clearly erroneous. Many important features and proposals contained in the enlarged Doheny memorandum appear in the December 11th contract and lease.

(b) *Preliminary Negotiations.*

At about this time we note increased activity in the various bureaus of the Navy touching the extension of the plan for fuel oil storage at Pearl Harbor (Pl. Exs. 161-165; R. II-608-15). Robison evidently anxious to get further fuel oil storage apparently did all he could to expedite the revision of the Navy's program for Pearl Harbor and also took up with the Interior the question of a contract and lease such as were finally executed on December 11, 1922. The result was negotiations between the Pan American officials and officials of the Department of the Interior and Admiral Robison representing the Navy. At the first conference, attended by Mr. Doheny, the preferential right was discussed (R. II-792). The tentative proposition was to lease to the Transport Company or its nominee, the Petroleum Company, all of the unleased portions of Naval Reserve No. 1; that which was covered by the preferential right to be drilled at the pleasure of the Petroleum Company; and that which was not covered by the preferential right to be drilled only if and when the Government consented thereto.

(c) *Determination of the Royalties.*

The negotiations seem to have gone on smoothly enough and everything was agreed upon except the royalties (R. III-1030). But the conferees could not agree upon the royal-

ties to be paid by the proposed lessee. We submit that the picture presented by the Appellants of this situation is wholly different from the facts. Mr. Anderson, Vice-President of the Pan American Company stated that it desired a flat rate of $12\frac{1}{2}$ per cent. (R. II-792, 793, 872; III-1030, 1031, 1127, 1128); while Robison insisted that the Government should have "high royalties" and held out for a royalty, which began at $14\frac{2}{7}$ per cent. (R. II-792, 793, 872; III-1030, 1031, 1127, 1128).

Subsequently Pan American came up to what are known as the Interior Department's regulation royalties under the Leasing Act of February 25, 1920, which consist of a sliding scale of royalties beginning at $12\frac{1}{2}$ per cent. and running up depending upon the average production per well per day per calendar month. The parties came to a complete *impasse*, Robison insisting on a minimum royalty of $14\frac{2}{7}$ per cent. and Anderson absolutely refusing to pay such a royalty and insisting upon the lower royalty (R. II-794; III-1031, 1132-33).

When this situation arose, Bain made some figures with regard to royalties and took them up to the office of Fall and talked them over with him (R. II-794). Fall and Bain then worked out an intermediate or compromise set of royalties. These were worked out in pencil and typewritten copies were made in the Secretary's office. Bain was then instructed by Fall to take them up with Robison (R. II-794). Fall took up these compromise royalties with Doheny personally and got the latter to agree to them (R. III-1131-32). The statements appearing on pages 77-78 and 227 of the Appellants' brief are misleading in that they create the erroneous impression that the compromise royalties were indirectly submitted by Fall to Doheny through Bain and Cotter.

Admiral Robison was not satisfied and told Fall that he wanted bigger royalties (R. III-1131). Fall answered, "That is the best I can get out of the old man; if you can do

better, go do it," or words to that effect (R. III-1132). Robison accordingly saw Doheny and tried to get better royalties but did not succeed because Doheny stood firm on the figures that he and Fall had discussed and agreed upon (R. III-1132). The contract was closed on the basis of the figures agreed upon between Fall and Doheny.

The assertion by the Appellants that Secretary Fall did not influence the making of the December 11th contract and lease or the negotiations leading up to them; that he took part only with Dr. Bain in the preparation of a suggested royalty schedule but in effect "washed his hands" of that matter; and that he turned it over entirely to Admiral Robison for direct negotiation (Appellants' Brief, pp. 280-81), cannot be sustained in view of the testimony above set forth.

Nor will it do to gloss over Robison's surrender to and acceptance of the royalties theretofore fixed by Fall and Doheny by stating that Robison and Doheny "reached an agreement to enter into a lease providing for royalties according to the schedule included in the lease of December 11, 1922" (Appellants' Brief, p. 79). The statements on pages 204-5, 228 and 290 of the Appellants' Brief that Fall's one connection with these negotiations "was in preparing with Bain a tentative schedule of royalties as 'affording ground for discussion' which was submitted to the Navy Department and to Mr. Doheny and was left entirely to the decision of the Navy without the slightest attempt by Fall to direct or even influence that deciding-department's action" is likewise contradicted by the above testimony. Counsel overlooked the fact that Fall took up these royalties personally with Doheny and obtained the latter's consent thereto; and that the efforts of Robison to go beyond what had already been fixed by Fall and Doheny were unavailing.

The Appellants attack the statement of counsel for the Government that the schedule of royalties was fixed by Fall and Doheny dealing directly; and quote at length from Bain's

testimony to disprove that contention (Appellants' Brief, pp. 230-31). But they do not refer to Robison's testimony (R. III-1131-32) that Fall told Robison that "he (Fall) and Mr. Doheny had been in personal contact on the subject and in discussion, and Mr. Fall said to witness he had gotten Mr. Doheny to agree that he would agree to a certain set of royalties which Mr. Fall handed to witness * * *." And that testimony was cited by us to sustain our statement. Fall's letter of December 8, 1922 (R. II-796-797) shows it was Fall and Doheny that fixed the royalties.

(d) *The Preferential Right.*

The difficulty in the way of the Government in these negotiations was obviously the preferential right. By virtue of that preferential right Doheny's companies had the Government in their power, for, if Fall exercised his prerogative under the contract of April 25, 1922, he could lease the whole eastern half of Reserve No. 1 to Doheny at royalties he thought proper. Admiral Robison's testimony with regard to the effect of the preferential right is most significant. Robison realized when it came to fixing the royalties to be paid under the December 11, 1922 lease, that he was in Fall's hands; that Fall had the sole and absolute power to fix the royalty scale; and that he could not stand out against Fall and Doheny. If Robison should break with Fall on the subject he could get nowhere with his pet storage scheme. Certainly Fall knew the same thing. Robison therefore surrendered.

He says this, with regard to the circumstances: **"The preferential right had a great deal more value than witness (Robison) suspected at the time"** (R. III-1097). In explaining that he did not tell Fall that they could say to Doheny that Fall would lay down to him certain royalties under his preferential rights and if Doheny refused to accept them, then the Government could turn around and advertise, he says, **"because that is the time when the preferential right**

got its value to the Pan American." (R. III-1132.) Robison admitted that there was no hurry about leasing Reserve No. 1, and that he could have waited long enough to take the matter up with some other oil companies or to advertise (R. III-1133).

Robison further stated that he knew of the high royalties obtained under the leases on Reserve No. 2 which had been let on competitive bidding. (R. III-1135.) As part of the direct examination of Assistant Secretary Finney certain leases let upon competitive bidding in June and July, 1922, were read into the record (R. I-437-48). These leases show that the Government fixed the royalty to be paid up to 100 barrels per day per well and let the prospective lessees bid upon production in excess of 100 barrels per day. The royalty bid on such excess production ranged as high as 72% (R. I-442), and averaged over 60% (R. I-437-48). Admiral Robison also stated that while these royalties were not quoted at the time the December 11, 1922, contract was being determined, yet the question of the Government's ability to get larger royalties was actively discussed and **it was determined that advertising should not be done** (R. III-1135-36). He adds, "That is where the value came to the Pan American Company in bid B. **Witness thinks at that time** (meaning April, 1922), **he made a mistake in the value to them of that preferential right. It was of real value to them then**" (meaning December, 1922). (R. III-1136.)

For obvious reasons, Appellants do not refer to the part played by the preferential right in the negotiation of the contract and lease of December 11, 1922. The foregoing story of the preferential right clearly demonstrates how unwarranted is the contention of counsel that said right was emasculated and was a preferential right in name only (Appellants' Brief, pp. 286-87). We are at a loss to understand the statement that the powers purporting to be granted by the preferential right were never exercised by Fall or

purported to be exercised (Appellants' brief, pp. 250-51, 288). The only power conferred upon him under that right was to advertise, if the defendant Transport Company did not accept Fall's terms. That power was never exercised because Fall and Doheny fixed the royalties, which Robison was forced to accept because the preferential right had come into full play.

As a result of these negotiations the contract of December 11, 1922, whereby Transport Company agreed to erect and fill storage for 2,700,000 barrels of additional reserve petroleum products at Pearl Harbor at cost was made, said contract providing as one of the considerations that a lease should be made to Transport Company's nominee, Petroleum Company, for all the unleased portions of Reserve No. 1, at certain royalties. This lease Mr. Doheny has stated he expected would bring to his companies ultimately a profit of \$100,000,000 (R. I-234, 240-42). In view of the estimates of the oil contents of Reserve No. 1, that expectation seems justified (R. II-864; III-1034). The significance of such anticipated profits is not lessened by the lengthy statement on page 282 of Appellants' brief to the effect that it involved further expenditures by Doheny over a period of years. No one expected and no one has argued that the lease was to yield forthwith \$100,000,000 in profits, without any capital expenditures.

When the final act in the drama was to be played Secretary Fall acted as *deus ex machina*. He came from the clouds at the psychological moment and delivered to the last jot and tittle the matters and things to which he had been committed to Mr. Doheny since the autumn of 1921. Can anyone contend that the corrupt bargains made between Fall and Doheny in the autumn of 1921 which we have above set forth did not poison and vitiate every contract and every lease made thereafter? We need hardly point out that the two leases, that of June 5, 1922, and that of December 11, 1922, were merely incidental to and in pursuance of the contracts of April 25, 1922, and December 11, 1922, respectively; and were osten-

sibly, and by the terms of those contracts, given as part consideration for Transport Company's entering into those contracts.

How can we better characterize these negotiations than by referring to the observation made by Admiral Robison upon cross examination when discussing the advertisement of naval construction work (R. III-1074).

"This whole thing was an extraordinary performance taken all together—it was entirely out of the ordinary."

6. The leases under attack were not required to be made to prevent drainage of the reserves by neighboring drillers.

The Trial Court specifically found that it was not necessary to make the leases of June 5 and December 11, 1922, in order to prevent drainage of the naval reserves (Findings Nos. 69 and 82; R. III-1415, 1419). These findings are not now attacked by the Appellants. Save for fugitive hints here and there in the Appellants' brief (pp. 16, 23, 24, 37, 55, 73 and 105) intended to suggest that Naval Reserve No. 1 was in some danger from drainage, no argument on the subject is made by their counsel.

These findings and their accuracy have, nevertheless, an important bearing upon the badges of fraud in the present case. In the first place, Secretary Denby was unquestionably led to do whatever he did in the way of signing the contracts and leases by the false belief that they were necessary for protection against drainage, which belief was induced by Fall and Robison. This will be demonstrated under a subsequent heading of this brief.

In the second place, certain Government officials concerned in the negotiation and execution of the leases have sought to justify them upon the ground that they were necessary to prevent drainage.

Lastly, although those Government officials advanced drainage as an excuse for the making of the leases under attack, yet they did not hesitate to advise applicants for leases on the naval reserves and others that no leases were being granted except for such offset wells as were necessary and to leave such persons under the misapprehension that there was no present need of such offset drilling. The voluminous correspondence with lease applicants is referred to in a subsequent portion of this brief dealing with secrecy.

The oral and documentary proofs in the present case warrant the findings by the Trial Judge. Director Bain testified without contradiction that the December 11th lease could have waited if the Navy had not been anxious for the storage facilities and admitted that the Appellant, Petroleum Company, had not developed Reserve No. 1 with any speed (R. II-874). Admiral Robison admitted that there was no need to hurry and stated that the most important function of the lease of December 11, 1922, in his mind was the accomplishing of the national security, *i. e.*, the storage of oil (R. III-1106-7, 1108, 1125-6 and 1133). In February, 1922, the Government had entered into a friendly agreement with the Pacific Oil Company to create a temporary reserve covering a large portion of territory in Reserve No. 1; and that temporary reserve agreement remains in force to this day and is recognized in the lease of December 11, 1922 (Pl. Exs. 76, 77, 78; R. I-353-56; Pl. Ex. 169 and Ex. D of Amended Bill; R. I-50, 58; II-619). Pursuant to the request of the Appellant, Petroleum Company, Secretary Fall entered into an agreement with the Standard Oil and other companies cutting down production to the very minimum and thus securing protection from possible drainage (Pl. Exs. 144-156; R. II-587-96). That agreement went into effect in late September, 1922, only a few weeks prior to the execution of the lease of December 11, 1922.

Mr. Cotter in his letter of July 28, 1922, expressed the belief that the oil in Reserve Number 1 could be safely stored under ground (Pl. Ex. 140; R. II-583-84); and Doheny's proposition of November 6, 1922, contains the statement that only a portion of Section 35 and possibly a small portion of Section 26 of Reserve No. 1 should be drilled (R. I-607). The lease of December 11, 1922, shows on its face that it was not made necessary by danger of drainage because the right of the Appellants to drill is restricted to certain specified areas and is subject to the existing non-drilling agreement with the Pacific Oil Company (R. I-57-8). The over-production of oil and the resultant flooding of the California oil market, which gave rise to the non-drilling agreement of late September, 1922, has deterred the Appellant, Petroleum Company, from pushing the development of the land in Reserve No. 1 with any speed, because, as Bain testifies, it was not good business to drill under such conditions (R. II-874). Although Robison testified that the lease of June 5, 1922, was granted upon the advice of Bain that a lease in the northeast quarter of Section 3 would have to be granted in order to protect against drainage, yet the witness admitted that but two wells had been drilled to date under that lease (R. III-1100-01).

The foregoing oral and documentary proofs forced the Appellants to abandon in the Trial Court the defense of drainage; and there would have been no occasion for the 69th and 82nd Findings of that Court, had it not been (1) for the attempt of certain Government officials to justify the leases upon the ground of threatened drainage and (2) the deliberate misleading of applicants for leases on the reserve.

7. Secrecy.

The Appellants have not specified among the errors intended to be urged before this Court the findings of the Trial Court (Nos. 19-21; R. III-1400) and the Court of Appeals (R. III-1505-6) that Fall, Robison, and other officials, concealed

and kept secret the contract of April 25, 1922, through fear of trouble from Congress, and not for military reasons. Counsel have now abandoned in this Court their contention, made both in the Trial Court and in the Court of Appeals, that there was no secrecy; and in lieu thereof say that such measure of secrecy as was observed was enjoined by the Navy Department because (1) the military plans of our Government concerning the establishment of a thing important to the naval defenses of the Pacific at a strategic point were involved and (2) the Navy feared legislative interference.

We shall demonstrate in a subsection immediately following hereafter that the observance of secrecy cannot be justified upon military grounds. The findings of the two lower Courts as to secrecy are conclusively indicated by the evidence and constitute one of the outstanding badges of fraud and proofs of conspiracy.

From the very beginning of Fall's interest in the naval petroleum reserves, all of his negotiations with Doheny and all of the negotiations between Robison, Fall and Doheny were clothed with the utmost secrecy. Other officials of the Interior and Navy Departments were kept in the dark and were instructed not to give out any information concerning the plans and negotiations. Therefore, in answering inquiries, if any answer was given, misinformation was given. Officials of the Navy Department referred inquirers to the Interior Department for information and officials of the Interior Department referred inquirers to the Navy Department for information. Where the inquirer was persistent and inquired of both departments, he was told that the information was confidential because of its military nature, and that the information would have to be obtained from the President.

Admiral Robison first claimed that his secrecy pact with Fall was not made until late January, 1922; but on cross examination he was compelled to admit that his earlier statement in a deposition taken in the case of *United States vs.*

Mammoth Oil Company, wherein he testified that the pact was entered into in late October, 1921, was more accurate. This admission was brought about by again directing the witness's attention to the letter of Admiral C. S. Williams, Director of War Plans of the Navy Department, dated November 4, 1921, to the Chief of Naval Operations, which reads in part (Pl. Ex. 259; R. III-1058):

"There may be a certain amount of danger in giving too much publicity, because as soon as it is known what the character of the arrangements are, Congress will undoubtedly use these arrangements as a reason for cutting down appropriation for fuel and transportation. If this is done, of course the reserves which we so badly need, and which we seek to establish, will not be established. **Furthermore, it is conceivable that the whole project might be met with open hostility in certain quarters because it operates to some extent to increase appropriations under fuel and transportation beyond what is set down in the bill; and in another way it operates to create reserve fuel storage, the construction of which has not been specifically authorized by Congress. In view of the foregoing it would seem advisable to close the arrangements as soon as possible without undue publicity.**"

Counsel for the Appellants refer to Admiral Robison's testimony concerning a conference with Fall, Ambrose and Bain, in late January, 1922, in order to show that the secrecy agreement was not arrived at until that time (Appellants' Brief, p. 272). They make no reference whatever to that part of his cross examination, wherein the witness was compelled to admit that his testimony in the Mammoth case was the more accurate and that Secretary Fall and Admiral Robison intended that "the public and Congress should not get knowledge of what was being done until it had been in fact done" (R. III-1054-58). The significance of such testimony lies in the fact that such intention was explicitly carried out. Fall

Robison, and other officials, gave out no information concerning the contract of April 25th until the formal award had been actually made; and thereafter they gave out no more information than was necessary under the circumstances.

When negotiations reached the point that the assistance of subordinate officers was necessary, it became necessary for such officers to be cautioned not to give out any information. This was done. A memorandum prepared on April 12, 1922 and issued on April 13, 1922 by Fall (Pl. Ex. 114; R. I-405) reads:

"Referring to constant requests for information concerning rumors or statements as to disposition of naval reserve oil lands:

"The general policy in these matters has been given publicity. In carrying out this general policy as it is being carried out through the cooperation of the Navy Department and of the Interior Department, it is being handled by the Secretary of the Interior and the Secretary of the Navy **but not in a routine manner by either department. The consequence is that the officials of the bureaus of either department are not able to give out any information whatsoever as to the detail of any plans of any kind or character."**

This memorandum was forwarded by Secretary Fall to Secretary Denby in his letter of April 12, 1922 in which he said (Pl. Ex. 113; R. I-403):

"I am also handing you a copy of memorandum which I have made for the government of my staff in giving out any information concerning these contracts.

"I have instructed my office force to give out nothing of the details of any of these contracts and to retain in a secure place the original contract with the deeds, etc. attached. This for the reason that it has been customary to file all contracts with the general files, where by inadvertence they might be subject to examination by parties not entitled to see them.

"I am particularly anxious that no details should be given out pending the final agreement upon the contracts for the construction of reservoir facilities in Hawaii."

The Finney and Safford telegram of April 17, 1922 to Secretary Fall (Pl. Ex. 120; R. I-419-420) and Fall's reply of April 18, 1922 (Pl. Ex. 121; R. I-420-421) show that the utmost secrecy had been observed in all the negotiations because Finney and Safford asked permission to "immediately make public the entire disposition of all naval reserve contracts, with reasons therefor," and Fall authorized them to make the disposition public after the contract with Pan American had been closed. The injunction not to make anything public until the contract had been closed was followed. (Def. Ex. DD; R. II-523-524.) In the statement given to the press (Def. Ex. CC; R. II-519-523) no mention is made of the fact that the Pan American contract called for the exchange of the royalty oil for tanks, or of the fact that it was given a preference right to such further leases as might be made in the California reserves. The public would understand from the information released that the royalty oil was being exchanged solely for fuel oil.

Soon after the closing of the contract of April 25, 1922, negotiations were commenced for leases under the preferential right granted in that contract, and for the enlargement of the Pearl Harbor program, so that it would justify the granting of a lease upon the entire unleased portion of the California reserves. Again these negotiations were carried on by Fall and Doheny in a non-routine manner, and those few departmental officers who had anything to do with the negotiations were following the injunction of secrecy, but Fall feared that in making the annual departmental report, Judge Finney might forget that secrecy was desired, and on November 6 he wired Finney from Three Rivers, New Mexico that in the preparation of the report (Pl. Ex. 243; R. II-695)

it was "unnecessary go into details naval oils as we merely co-operating with Navy."

After the lease and contract of December 11, 1922, had been executed, Fall had the lease removed from the public file of the General Land Office of the Interior Department to the Bureau of Mines, where a confidential file of papers pertaining to the naval oil reserves had been established. This file was not considered a part of the files of the department and access to it was limited. In this regard Fall wrote a letter to Commissioner Spry on January 22, 1923 which reads in part (Pl. Ex. 172; R. II-621):

"At the request of the Navy Department, and in pursuance of the war plans of the General Board, I have made certain exchange arrangements and agreements under which contractors are charged with the responsibility of drilling offset wells and performing other development as ordered by the Government, upon lands within the Reserves but outside the leased areas mentioned above. **These contracts form part of the confidential records of the Navy Department and are not for public inspection. Copies have been deposited with the Bureau of Mines for guidance of the officers of that Bureau in enforcing the contracts and may be inspected by you as occasion arises, but are not considered to be part of the files of this department.**

"No portion of the Naval Petroleum Reserves are now subjected to entry in any form or to leasing through this department."

In accordance with Fall's plan of placing the December 11, 1922, lease in a separate and distinct file which would not constitute a part of the departmental files and would not be open to public inspection, A. W. Ambrose, of the Bureau of Mines got in touch with the Bureau of Mines office at Bakersfield, California, and instructed it not to permit the public to inspect this lease. His letter containing such instructions reads (Pl. Ex. 255; R. II-877):

"You have a copy of the lease which practically gives them a lease on the eastern half of the reserve and requires that they drill necessary offset wells on the western half of the reserve in case the Government feels that drainage is taking place from wells on the bordering territory. Obviously, the Navy is not anxious for any more to be said about this than is absolutely necessary, and the Secretary has directed the representatives of the Bureau in Washington to maintain the whole matter confidential as this was requested by the Navy. As a result we have referred all inquiries to the Navy Department and are letting them make whatever announcements or give whatever information they desire, and I suggest that in so far as possible your office should take the same attitude. I appreciate that this puts you in a somewhat difficult position, but inasmuch as the Naval reserves are considered a part of the National Defense, and as long as the Navy requests us to keep this information confidential, I think that is the best way for us to keep in the clear in the matter."

After considerable correspondence in which the embarrassment of the officials of the Bureau of Mines was expressed (Pl. Exs. 275, 276, 277; R. III-1180-83; Def. Exs. ZZZ, A-4; II-885-887), the Navy Department finally expressed the view, on July 23, 1923, that there was no reason why the terms of the lease should be any longer kept secret.

Even after the investigation of the transaction was commenced by the Senate Committee on Public Lands the confidential file containing the contracts and leases and vital correspondence, such as the November 28, 1921 letter from Doheny, was not turned over to the Committee, although the Committee had requested all papers pertaining to the transaction. (R. II-833.)

When Admiral Robison took charge of the Bureau of

Engineering, Commander Stuart was in charge of the Fuel Oil Office and responsible directly to the Secretary of the Navy. Shortly he was made subordinate to and responsible to Admiral Robison. Thereafter, he was ordered to have no official communications with the Interior Department and because he opposed the lease to the United Midway, believing its claim invalid, and because of the secrecy desired, he was never consulted concerning the negotiations, contracts, or leases (R. I-112, 114, 116, 118, 315). Commander Landis, Inspector of Naval Petroleum Reserves, stationed at San Francisco was never consulted. (R. I-133). Dr. Mendenhall, who, upon the recommendation of Assistant Secretary Finney had made an investigation for Secretary Fall in June, 1921, opposed the United Midway lease and saw no danger of drainage warranting anything more than offset leases. His recommendations were disregarded by Fall, and he was never thereafter consulted in connection with the negotiations, contracts, or leases (R. I-313, 315). Assistant Secretary Finney himself, who was in charge of the sub-department generally handling leases of lands in the public domain, was given only scraps of information concerning the negotiations and permitted to take but a minor part in the drafting of the contracts and leases. He did not see Mr. Doheny's proposal of November 28, 1921 from that date until December 16, 1921 (R. I-342). He had no part in arranging the contract and lease of December 11, 1922, and did not know of it until after it had been executed. (R. I-436.)

During 1921 and 1922 many individuals and corporations inquired for leases of lands in the California reserves, but in every case they were either refused information and told to consult a different department of the Government, or were told that no leasing was contemplated, or were given other misinformation. In almost every case they were told their application would be filed and if any further leasing was

to be done, they would be given an opportunity to bid. The following excerpts are typical:

"The department instituted the policy of drilling necessary offset wells in Naval Reserve No. 1 to prevent undue drainage from wells located on surrounding land. * * * The most urgent offset wells have been provided for and to my knowledge the Secretary is not planning to throw open any of Naval Reserve No. 1 in the near future."

(Pl. Ex. 209; R. II-650.)

"Your application has been placed on file and, also, has been called to the attention of the Bureau of Mines. I feel sure that the Secretary will be pleased to consider a bid from your company when, in the best interests of the Government, it is decided to lease additional tracts in this reserve."

(Pl. Ex. 231; R. II-670.)

More than a score of such inquiries and applications by prospective lessees may be found beginning with plaintiff's exhibit 182 (R. II-627) and ending with plaintiff's exhibit 236 (R. II-676), and the reply in every instance is couched in similar language.

While such replies were being sent to lease applicants Secretary Fall and Mr. Doheny were formulating the plan for preferential rights and later the plan for the execution of leases consummating the original understanding that Mr. Doheny should have a lease upon the entire California reserves. Did drainage require leases to Doheny's companies but not to others? This deception is important, not only because it shows that there was no real competition for the leases, but also because it shows that there was a very conscious effort to keep the whole matter secret. Evidently there was a consciousness of wrongdoing.

The applicants for leases were not the only ones who were deceived. Senators and Congressmen entitled to know

the facts were given misinformation and the opposition which Admiral Williams suggested on November 4, 1921 was thus avoided.

Shortly before March 24, 1922, Congressman French of the House Appropriations Committee called Admiral Robison by telephone and requested certain data relative to the operation of the reserves. In answer thereto Admiral Robison, on March 24, 1922, sent the following letter to Congressman Kelley, Chairman of the Sub-Committee of the House Committee on Naval Affairs (Pl. Ex. 260; R. III-1063):

"On Monday morning Congressman French of the House Appropriations Committee called me on the telephone and requested me to furnish certain information relative to the operation of the Naval Petroleum Reserves.

* * * * *

"In accordance with the general agreement arrived at between the two Departments the Department of the Interior is taking steps to have Naval Petroleum Reserves Nos. 1 and 2 drilled with *offset wells* in every case where adjacent property is drilled. It has been further agreed

"(a) That the amount of drilling with consequent exhaustion of the Reserves shall be kept as low as practicable without risking the depletion of the Reserves by other parties.

"(b) That the equivalent of all royalty oil shall be delivered to the Navy in the form of fuel oil at such points on the Pacific Coast as may be found necessary for Naval use, and that this exchange of crude oil for fuel oil will be effected on as favorable terms as it is possible to obtain. It is presumed that under favorable circumstances and terms arrangements may be made for including points on the Atlantic Coast for the delivery of an equivalent supply of fuel oil to the Navy.

"(c) That the equivalent of the royalty oil will be placed in storage at such points as the navy may designate.

"(d) That the Interior Department will exercise its best efforts to obtain for the Navy as large royalties and as favorable terms as practicable by public competition or otherwise.

"(e) That the development of Naval Petroleum Reserve No. 3 is to be undertaken only to protect the Government against depletion of the Reserve by other parties.

"In connection with this program it has been estimated that the Navy will obtain by 30 June, 1923, royalty oil amounting to 592,200 barrels, which will give an equivalent in fuel oil of 567,400 barrels. For the fiscal year ending 1 July, 1923, the royalty oil to be obtained is estimated at 1,350,000 which will give an equivalent in fuel oil of 1,286,460 barrels. Under the terms of the agreement this oil will become a reserve—above ground instead of under ground as now.

"The following data with reference to the Naval Petroleum Reserves are submitted for your information:

* * * * *

"As to No. 2 Reserve it is generally admitted that no Reserve as a Reserve now exists and it will be necessary to drill up within a short (time) the entire Reserve. In order to meet this situation the Department of the Interior is granting leases from time to time to various operators to drill these lands on a royalty basis varying from 12½ to 25 per cent. depending upon the production of the individual lease.

"Trusting that the above information is that which you desire and assuring you that if there is any further information which I can furnish I shall be glad to do so."

Admiral Robison admits the evasion in his letter but justifies it upon the ground that he included therein "all the information that should become a part of the printed public records at that time in order to accord with the agreed policy as to secrecy." (R. III-1067.)

Frequently, instead of giving evasive and misleading information to inquirers, Robison affected ignorance and would

refer the inquirer to the Interior Department. This cross-referring of inquiries is well illustrated by his letter to Congressman N. J. Sinnott, dated April 19, 1922 (Pl. Ex. 261; R. III-1069). Congressman Sinnott asked, among other things (R. III-1068):

"What if any disposition has the Department in contemplation with reference to any of the three Reserves in the immediate future?"

and (R. III-1069):

"What lands if any are yet subject to leasing or development contracts in Naval Reserve No. 1, California?"

Admiral Robison's reply was (R. III-1069-70):

"* * * I am very sorry to say that I am unable to give satisfactory answers to several of your questions. As you know, the President, on 31 May, 1921 signed an executive order transferring the care, operation and preservation of these reserves to the Department of the Interior. Since that date I am not able to give all details of what has transpired. * * *

"Referring to question (3) *et seq.* of your letter, I am not able to give this information but it can probably be obtained from the Department of the Interior."

At that very time Robison knew that an award had been made to Pan American, in accordance with the contract subsequently executed on April 25, 1922.

On December 11 Senator Harreld wrote Fall that he had heard on good authority that the Interior Department contemplated leasing a part of Naval Reserves 1 and 2, and requested information because he had some very reputable, capable, and responsible parties who desired to submit bids to the department for oil leases covering all or any part of these reserves (Pl. Ex. 241; R. II-693). Fall refused all information (Pl. Ex. 242; R. II-694) saying:

"The Navy Department is a military arm of this Government and information concerning their plans, the details of same, etc., must be secured from the Navy Department itself.

"I think you can readily see that this is the case and I have no doubt that an application to the Commander-in-Chief of the Army and Navy from yourself will receive favorable attention if it is deemed to be in accord with the best interests of the Government."

(a) *Secrecy was not Justified by Military Expediency.*

Appellants emphasize on pp. 266-72 the alleged military reasons that lay behind the injunction and observance of secrecy. It is argued that the Pearl Harbor project was part of the military plans of the United States and that these plans ought not to be disclosed. If such reasoning were sound, it would inevitably follow that these plans should still be kept secret and that the Navy and Interior Departments should have refused to comply with the Kendrick resolution upon the ground that it sought information upon a matter which the best interests of the United States required to be kept secret. The testimony of Admiral Robison and Admiral Gregory incontrovertibly shows that the observance of secrecy was not justified by military expediency. We have previously demonstrated that the fear of Congressional opposition was in the minds of all by early November, 1921, and was the real reason for keeping the negotiations secret.

Both Admiral Robison and Admiral Gregory admitted on the stand that so far as the leasing of lands in the reserves is concerned there was no military secrecy necessary (R. II-578; III-1074). We do not understand that counsel for the Appellants gainsay this admission. These two witnesses testified that war plans are kept secret until determined upon and that then the usual course is to advertise for bids. At that moment the project necessarily becomes known. War plans are tentative plans of the Navy Department, indicating what

the Navy thinks should be the program for the national defence. They are subject to change from time to time and are not revealed to Congress until a definite sum is asked of Congress in an appropriation (R. II-545, 546, 560; III-1073, 1074).

In support of their contention that the Navy Department enjoined secrecy for military reasons, counsel refer to Assistant Secretary Roosevelt's letter of December 9, 1921, in which, referring to the Pearl Harbor plans and specifications, the request was made that "all matters in connection therewith be regarded in as confidential a manner as possible." Assistant Secretary Roosevelt testified that the naval authorities regarded the information concerning oil storage as confidential and that there was no reason other than this for observing secrecy (R. II-949). The same witness in authorizing the Interior Department to make public the lease of December 11, 1922, wrote under date of July 23, 1923 (Def. Ex. A-4; R. II-887-88):

"Since the military features of the national defense enter largely into considerations of this nature, it is believed that a degree of secrecy has surrounded the whole undertaking that is probably not necessary. There has been no disposition on the part of this Department, to treat these leases in their entirety so confidential, it being desired to retain as confidential only the amounts and location of the resulting petroleum products when placed in storage. It is realized that, being physically of some size, these cannot be really kept secret, yet it is not desired to spread the information that these reserves of petroleum products are in existence or are planned."

Counsel also invoke in their aid the deleted plats of the Pearl Harbor Naval Station and the inhibition against photographs. Such precautionary measures are always observed about military fortifications and would doubtless have been

observed even if the customary publicity had been given to the contract of April 25, 1922.

As Admiral Robison and Admiral Gregory reluctantly admitted, secrecy as to oil storage could only be observed up to the moment that public bids thereon were asked. Besides, storage tanks of the kind called for under the contracts of April 25, and December 11, 1922, tower into the air and cannot be concealed or kept secret once the construction thereof has gotten well under way (R. III-1074).

The oral and documentary proof make it letter-clear that the reason and purpose of the secrecy pact between Fall, Robison and other officials was in order that Congress and the public should not know what was being done and was not for military reasons. In so finding (Finding No. 20; R. III-1400), District Judge McCormick had clearly in mind the alleged military necessity and the testimony thereon, as is shown by the concluding words of his opinion upon that subject (R. III-1292-3):

"The evidence in this case shows that by October 25, 1921, both Secretary Fall and Admiral Robison had agreed upon the adoption of a policy whereby royalty oil should be bargained for tankage and its contents of fuel oil at Pearl Harbor, and that they had further agreed at that time that any negotiations relative to the carrying into effect of such policy were to be kept secret, so that their intentions could not be thwarted by Congressional interference, or become generally known to the public. The contention of defendants that the secrecy which attended all of the negotiations leading up to the contract of April 25, 1922 and of December 11, 1922 were because of Navy war plans is, in my opinion, not sustained. Even if the Pearl Harbor construction was such as to require secrecy, the oil leases in the naval reserves demanded no such safeguard. The secretive manner in which these leases were made cannot be justified by any war emergency plan."

8. Wilful disregard of legal advice.

Unless Secretary Fall had some ulterior motive spurring him on to complete the contracts and leases, he would not have disregarded the opinions of attorneys for several of the oil companies consulted by Bain, that the proposed plan was illegal. It is customary for Cabinet officers to request the opinion of the Attorney General of the United States upon any plan, the legality of which has been questioned. Theoretically, Government officers have no possible motive for proceeding hastily when such doubts have been raised. Theoretically, they derive no personal profit from taking a chance. The danger of drainage was not pressing, and the opinion of the Attorney General could have been obtained; and, if adverse, additional legislation obtained, if the plan was harmonious with the policy of Congress.

Bain testified (II-842) that in October or November, 1921, he suggested to Fall that it would be well to get the opinion of the Department of Justice.

While Bain was on the Pacific Coast in January, 1922, to interest selected oil companies in bidding, he had a conference with Standard Oil Company officials, during which its counsel, Oscar Sutro, expressed an offhand opinion that the plan was illegal. Mr. Sutro followed this up with a formal written opinion on January 27, 1922, definitely advising his company that the plan was illegal (Pl. Ex. 51; R. I-296-300). While on the same mission, on January 3, 1922, A. L. Weil, Attorney for the General Petroleum Company, told Bain that in his opinion the plan was illegal and he would not permit his company to bid. (R. II-540, 740.) Mr. Weil suggested that if the Attorney General of the United States approved of the plan, he would reconsider the matter. Bain refused to promise that the Attorney General would be requested to render an opinion.

Upon Bain's return to Washington, and about January 25, 1922, he told Fall and Robison of the legal doubts which had

been expressed by the attorneys for the concerns he had consulted. (R. II-743). At the same time, Bain suggested to Assistant Secretary Finney that the opinion of the Solicitor for the Interior Department be obtained. (R. I-346; II-842.)

In February or March, 1922, the attorney for the Associated Oil Company and the New York City attorneys for Ford, Bacon and Davis gave opinions to the effect that the plan was illegal (R. I-304; II-843-44). Early in the transactions, Dr. Bain told Fall that Mr. Weil, Attorney for the General Petroleum Company, had disapproved of the plan and that Mr. Sutro, Attorney for Standard Oil, believed the plan illegal (R. II-743, 842).

By a letter dated April 12, 1922 (Pl. Ex. 102; R. I-393-394) Fall suggested to Secretary Denby that it would be advisable to obtain further legislation from Congress, in order to be certain of the legality of the plan. This request was not in good faith because at that very time, Fall was criticising Finney and Bain for not already having closed a contract with Doheny. Secretary Denby did not follow out the suggestion because Robison told him the Government was certain of a bid from Doheny, and that it was, therefore, unnecessary to have such legislation in order to get a bidder.

On March 3, 1922, Bain wrote Colonel Black of Ford, Bacon and Davis, acknowledging a copy of Mr. Sutro's opinion and stating (Pl. Ex. 96; R. I-387):

"* * * I am sure we can back our plan with good legal opinion, since the matter happens to have been examined by attorneys outside, as well as inside the Service. I will give you the results later."

Such results were never given to Colonel Black, and Bain testified on cross examination that the attorneys to whom he referred as having approved the plan were the Judge Advocate General of the Navy Department and the attorneys for the White Engineering Company (R. II-843), but by May 12,

1922, Bain was again becoming apprehensive that the consequence of the almost unanimous opinion of disinterested attorneys against the plan would be a serious disadvantage. At that time, he was endeavoring to get the lessees of lands leased in settlement of placer mining claims to turn over the Government's royalty oil to the Pan American Company, in accordance with the contract of April 25, 1922. The attorneys for the lessees did not think the receipt of the Pan American Company would be a valid discharge of their obligation to the Government, and so Bain dictated a letter to Fall, in which he said: (Def. Ex. EEE; R. II-784-786).

"I have been surprised to find that the Standard and General Petroleum in particular are adopting a very technical attitude toward this transfer, going so far as to raise a question as to whether either company would be safe in making such a transfer or in later handling any of the oil in case the Pan American desired to have them do so. As you will recall, Mr. Sutro and Mr. Wyle have been doubtful as to the right of the department to make the exchange contract. They now seem to have become positive that no such right exists and Mr. Storey is even interpreting the law so far as to question the right of the Standard to deliver oil to the Pan American on our order. * * *

"There is, however, another phase to it. None of us want Mr. Doheny to get into trouble, and I take it we will want to do anything we can to make it easy for him. * * *

"Out of all this has come the suggestion repeatedly that the opinion of the Attorney General be obtained as to the legality of the contract. I realize the objections to asking such an opinion, but I have thought it proper to let you know the difficulties that are being raised here so that you might reconsider the matter and decide as to whether you might not properly ask the Attorney General to put in writing what I have understood was his informal and verbal expression of opinion favorable to the action the department has taken.

I am not certain that Mr. Doheny cares, but Mr. Cotter will see him tomorrow, and if it does seem to them important, I am giving Mr. Cotter this letter to show you, so that you may know what I have found out here."

Doheny did not care. The letter was never delivered to Fall. (R. II-786-87.) Neither the Attorney General nor the Solicitor for the Interior Department ever was requested to give or gave any opinion, verbal or written, approving the exchange plan or any of the contracts or leases (R. I-346, II-842, III-1193). The reason no opinion was requested from the most qualified attorneys for the Government and those who would normally be asked for opinions in such matters is expressed by Bain in his testimony (R. II-787-88) as follows:

"* * * First, 'the fact that the Department, having gone ahead and made the contract, to then ask for a legal opinion to fortify its action, would throw doubt on its own confidence in its judgment in making such a contract, and, second, was the fact that whenever you ask a lawyer for an opinion, you may get into the hands of a lawyer who is thinking only of strictly technical legal matters, and who gives you a highly technical opinion, and he has no responsibility whatever for carrying out a thing or getting anything done, and in the Government service there are a great many men whose business it is to pass the buck and to pass the responsibility on to somebody else; and when we ask for an opinion from another department, we never know what kind of a lawyer is going to pass on it. They have some very excellent lawyers in the Department of Justice, but when you ask for an opinion over there, you don't know whether it will get to one of them or somebody who is merely interested in building up a good record for himself, and never letting anything be done which might come back on him.'

"The witness was familiar with the custom in the executive departments at Washington as to when opinions of the Attorney General were asked; they are asked when the department itself is in doubt."

Counsel for the Appellants set great store by the written opinion of the Judge Advocate General of the Navy Department, of December 2, 1921 (Appellants' brief, pp. 32-34). In thus pointing out that the legal advice of the Judge Advocate General was sought and received, no mention is made of the fact that this advice was taken by Robison at a time when no doubts had been expressed by eminent counsel representing large oil companies. The Judge Advocate General was of the opinion that the power of exchange was unrestricted (R. II-701), and that the Act of June 4, 1920, did not specify or limit what might be taken in exchange for the oil and its products. This broad construction of the Act of June 4, 1920, is now repudiated by counsel for the Appellants on pp. 111-112 of their brief. They were forced to admit in the Court of Appeals, and now concede, that some reasonable limitation must be placed upon the word "exchange." The Judge Advocate General of the Navy was never consulted, and his opinion was never asked, upon the validity of the Executive order of May 31, 1921, or upon the validity, legality or form of the contract of April 25, 1922.

The positive opinions of the many outside attorneys who, in spite of the opinion of the Judge Advocate General, thought that the plan was illegal, should have induced the responsible officials to consult the Attorney General. The only explanation for the failure to obtain such an opinion is that Fall and Doheny believed it would be disapproved by the Attorney General and/or that the contemplated action would become public and be stopped by Congress as contrary to the policy of the Act of June 4, 1920. That this is the real reason is made clear by the disclosure of the evidence discussed in this brief under the heading of "Secrecy."

The early determination of Fall to avoid any consultation with the Attorney General's Department in the matter of the handling of the petroleum reserves is illustrated by the most peculiar conduct of Fall following a request made by Secretary

Denby of the Attorney General in early May, 1921, for an opinion as to the legality of the claim of United Midway. On May 5 Secretary Denby addressed the Attorney General and gave the history of the United Midway application, and requested his opinion as to the right of the claimants to any further consideration. He sent a copy of his letter to Fall, and on May 11 Fall addressed a personal letter to the Attorney General, stating that the Attorney General's opinion was not desired. At this early date Fall had a program in mind which made it worth his while to appeal to the Attorney General personally to head off any possible rulings that might tend to limit his discretion in the administration of the petroleum reserves.

The significance of the wilful disregard of the adverse opinions of eminent lawyers is well summarized in the opinion of Judge McCormick as follows (R. III-1334):—

"If there had been a sincere and real attempt to interest the leading commercial oil companies in the project to the end that they would on common ground compete with one another in bidding on the contract so that the Government would obtain the most advantageous and best bid, there would have been a desire and an eagerness to obtain an opinion from the Attorney General as to the legal right of the Government to make the contracts."

Again Judge McCormick says (R. III-1336):—

"This was a peculiar position for him (Secretary Fall) to take if he was not trying to thwart competition and to favor his friend and benefactor Mr. Doheny. * * *

"The failure to adopt such a course is another badge of fraud and another of the many suspicious circumstances concerning Secretary Fall's activities in the matter of the contracts in controversy in this case."

9. Fall's activity and dominance in the negotiation of the contracts and leases.

We postpone for argument under a later head of this brief the proposition that whether Secretary Fall acted *de*

facto or *de jure* in connection with the contracts and leases, if he acted fraudulently or was corrupted by or conspired with Doheny in connection with them, this fact avoids them. We address ourselves here only to a citation of the facts which justify the findings of the Trial Court (R. III-1397-8; 1414-15; Findings Nos. 12 and 67), that Secretary Fall was active and in constant touch with the negotiations throughout and that he dominated them and that no decision was made without his consent and concurrence.

During all the negotiations and dealings up to the contract of April 25, 1922, and thereafter by virtue of the very terms of the contract of April 25, 1922, Doheny and the officials of his company, Secretary Denby, Admiral Robison, and all the officials of the Interior Department believed and acted upon the belief that Fall had the power, and that the power to act rested in him alone. Robison said that Fall thought that the Executive order made the Naval Petroleum Reserves an Interior Department matter and that to advance the Navy business best he yielded to the Secretary's views in that matter on all unimportant matters. (R. III-1062.) As early as September, 1921, Fall had the same belief (Def. Ex. P.; R. II-482).

The statement of Secretary Denby in the Navy Council meeting of October 18th, above quoted (Pl. Ex. 293; R. III-1176) shows that it was Denby's intention to turn the matter of leasing and administering the oil reserves absolutely over to Fall and to have nothing to do with them himself. There is no evidence in the case anywhere that he ever changed his mind on this subject. It was Fall who about this time was arranging for a proposition from Doheny's company (this brief, *ante*, pp. 18, 20).

The policy letter (Pl. Ex. 24; R. I-146) which Robison in collaboration with Fall prepared and which Denby signed on October 25, 1921 (R. II-960, 965; III-1111), as we have above demonstrated, clearly shows that the Interior Depart-

ment was to follow a policy which the Navy Department expressed as satisfactory to it, one of the items of which policy was that it would merely turn over to the Navy copies of such leases as were made, as matter of information to the Navy Department only.

The invitations for all proposals were issued by the Interior Department (this brief pp. 55, 56, *ante*). The Navy Department's officers merely represented to the Interior Department what it was that the Navy desired in the nature of specifications and these specifications were included in the Interior Department's request for bids. These specifications for the contract of April 25, 1922, provided that the contracting party for the Government was the Interior Department (R. I-426).

Every negotiation with an oil concern or an engineering concern was conducted by Dr. Bain, Chief of the Bureau of Mines of the Interior Department, in close touch and under the supervision and with full information to Fall (this brief pp. 50-56, *ante*).

The legal objections which had been raised against the plan were reported by Bain to Fall upon his return in January, 1922, from the West; and Fall thought that the opinion of the Judge Advocate General was sound (R. II-744). Fall issued definite instructions that no contract should be closed without his prior knowledge and consent (R. II-849). The matter appearing in Appellants' brief, bottom page 46 and bottom of page 49, would give the impression that Fall did not retain final veto power and control over the awarding of the contract of April 25, 1922, and that he went away to Three Rivers and left this matter wholly in charge of others and in their unrestricted discretion. This is incorrect as Bain's testimony (R. II-849) will demonstrate.

In fact, all of the results of the so called bidding and the intent to award a contract to Pan American, and the kind of a contract to be awarded to Pan American, were

carefully submitted to Fall before the papers were executed, and these papers were not executed until he had given his consent to go ahead (Pl. Ex. 123; R. I-424). Even the matter of joining Secretary Denby as a party to the contract of April 25, 1922, was submitted to Fall for his consent before the thing was done (Def. Ex. FF.; R. II-525).

As we have above set forth, the contract of April 25, 1922, vested in Fall absolute and final power with regard not only to the administration of the contract itself considered as a construction contract, but it gave Fall the sole and unrestricted power to fix the terms of any leases which should thereafter be granted on what may be roughly designated as the eastern half of Naval Reserve No. 1. (Ex. B of Amended Bill; R. I-26, 34.) When it came to a cessation of drilling under the leases granted the Pan American Company, permission to cease drilling and cut down production was applied for to Fall (Pl. Ex. 140; R. II-582), and by Fall the permission was granted. (Pl. Exs. 141, 142; R. II-584.) There is no evidence that Fall even consulted the Navy with regard to this matter.

When Doheny evolved his so called "plan" in the summer of 1922, that plan was submitted to Fall. It was Fall who discussed that plan with Doheny and who afterwards handed it to Bain and Robison with his approval (this brief, pp. 65, 66, *ante*). And when finally the vital question of the royalties to be paid under the lease of December 11, 1922, was to be decided, it was decided in conference between Fall and Doheny. We have not the benefit of the testimony of either Fall or Doheny as to what went on at that conference. We only know that Fall, realizing the great desire of Robison to get a supplemental storage contract even at the expense of leasing up the whole of Reserve No. 1, told Robison that the schedule of royalties he had discussed with Doheny was the best he could get out of him and that if Robison thought he could do any better he should try (this

brief, pp. 68, 69, *ante*). It resulted that the schedule so suggested was adopted.

At pages 31 and 32; 34 and 35; and 213-214 of their brief Appellants call attention to the fact that Fall had gone West on December 1st, to show that he had nothing to do with the alleged change of policy of the Navy Department from the use of royalty oil for current use fuel oil to the use of it exclusively for reserve storage. But this will not do. We shall not again advert to the correspondence of November 28th and 29th (this brief, pp. 20-24, *ante*). We think we need not again advert to the fact that Fall handed Bain Doheny's letter with instructions as to working out a plan (this brief, pp. 28, 29, *ante*), and that on December 6th Assistant Secretary Finney, who did nothing in this matter without advising Fall, wired Fall that the Navy had decided to go back to the original plan (Pl. Ex. 237; R. I-329).

Again it is argued (pp. 32-37) that the Secretary of the Navy settled and defined the policy in December, in Secretary Fall's absence, of using royalty oil for storage purposes. If this is so, what becomes of the policy letter of October 25, 1921 (Pl. Ex. 24; R. I-146), in paragraph 4 of which this policy is set forth; and what becomes of Robison's successful fight for the fuel oil storage plan of October, 1921 (R. II-964, 965, 991, 959; III-1081, 1094)? See this brief, *supra*, pp. 26, 27, 28.

Counsel for Appellants indicate (pp. 36-7) that after the receipt of the letter of December 9th, 1921, the Interior Department proceeded as a routine matter with the Pearl Harbor proposition, and add that Fall, who was absent from Washington, had nothing whatever to do with it. It is to be noted in this connection that on December 6th, 1921, Assistant Secretary Finney wired Fall apprising him of the situation (R. I-329), and that on December 23rd, 1921, Bain wrote Fall a full report of the situation preparatory to his going to interview Fall at Three Rivers about it (Pl. Ex. 70;

R. I-345). Besides, Bain stopped off at Three Rivers, New Mexico, on his trip west, reported to Fall in person and obtained his approval of the plan and of the oil companies on the Pacific Coast to be approached as prospective bidders (R. II-725, 726).

Appellants contend that Fall withdrew from the matter of the Pearl Harbor project and left it to Bain and Finney. As we have above pointed out, Fall never let go his hold on the proposition. At every stage and every step what was to be done was subject to his approval. Moreover, as Fall had knowledge of the situation that other oil concerns would not bid and had the assurance that Doheny's concern would bid, what more clever course could he take than apparently to leave the matter of the invitations for proposals and the preliminary preparation of a contract to his subordinates while he, in fact, retained ultimate control of the situation.

On pages 214 and 215 of their brief Appellants say something to the effect that Fall had not been in personal touch with the details of the Pearl Harbor matter during the spring of 1922. The evidence does not so indicate, but indicates just the contrary. The questions that were arising with regard to legality were all reported to Fall and discussed with him (this brief, pp. 57, 58, 90, 91, *ante*). The question of the probability of various companies on the Pacific Coast bidding was discussed with Fall (this brief, pp. 57, 58, *ante*).

We might as well here and in this connection discuss another matter referred to on pages 216-7 of Appellants' brief, which is Fall's letter of April 12, 1922, to Denby. Bearing in mind that the legality of the proposed exchange was still a matter of discussion and doubt, Fall, on the day before he left for Three Rivers, and three days before the Pearl Harbor bids were opened, and five days after he had actually executed and signed the lease on Reserve No. 3 to the Mammoth Oil Company, writes Denby a letter which is anything but frank. The letter will be found as Plaintiff's

Exhibit 102; R. I-393. In the first place, Fall, with apparent frankness, states that the difficulty of exchanging royalty oil for storage is that oil companies are not competent to do construction work, and that this therefore is a costly method of procedure. He knew that the Pan American company was going to make a bid at cost because he had been told so. Moreover, he had had Pan American's proposition of November 28, 1921, showing that the Pan American's bid was at cost. He states that on account of the existing difficulty he suggests an amendment to existing law. This appears at the bottom of page 393 and top of page 394 of the Record. It will be noted that the amendment suggested, if adopted by Congress, would absolutely justify and make lawful the exchange, the legality of which had so often been called in question, and Fall calls attention to these facts in his letter. This was the construction that Robison placed upon the letter, when he first read it (R. III-1088).

He then goes on to say that he is holding up the proposed contracts indirectly by taking abundant time for the consideration of bids, etc., in the hope that meantime the amendment may be adopted, and that he can thus deal with one concern for the royalty oil and a different concern for the construction and so save the Government money. Of course this statement is wholly untrue. The evidence shows that he was at this very time pressing Bain and wanting him to hurry through the Pearl Harbor matter, and even suggesting that they close it by negotiation rather than by competition (this brief, p. 57, *ante*).

Fall winds up his letter by the suggestion that he thinks Secretary Denby will have no difficulty in getting the amendment, and adds this significant phrase:

"It may or may not be necessary to go fully into the details of what we are trying to do at Pearl Harbor; of course impressing Congress with the view that too great publicity should not be given to the subject."

Whatever may have been the real motive for this letter, it is certainly not one from which the Appellants can gain much comfort, when the sinister character of it certainly indicates anything but open dealing and good faith. Of course no action was taken on the strength of the letter, because Admiral Robison knew that there was to be a bid from Doheny, and that bid at cost (R. II-1001-02; III-1089, 1090).

10. Doheny's active participation in the negotiation of the contracts and leases.

The Trial Judge found not only that Edward L. Doheny directly or indirectly controlled over 50 per cent. of the voting stock of the Appellant, Transport Company, which in turn owned and absolutely controlled the Appellant, Petroleum Company; but also that Edward L. Doheny purported to be and was in fact in effective control of the policies and actions of both companies during the negotiation and execution of the contracts and leases now under attack (Findings Nos. 1, 2, 3, 4 and 5; R. III-1393-94). These findings are not included in the Specifications of Error intended to be urged by the Appellants in this Court and are not the subject of attack in their brief.

In his testimony before the Senate Committee, Mr. Doheny said (R. I-214, 232) that Secretary Fall would be likely to be influenced in his companies' favor by reason of the financial transaction between them, but he added that Fall had not had anything to do with the negotiations. In this, he was obviously wrong since Fall and he were frequently in touch with each other during the negotiations. The dealings with Fall over the July 8, 1921, lease were personal between him and Fall (Pl. Ex. 12, R. I-133; Def. Ex. L; R. 1-471); he complained in person to Fall in Washington, in July, 1921, about the high royalties being paid under that

lease (R. I-130); the first discussion of the fuel oil storage plan, of the Pearl Harbor project and of further leases to be granted to his company was had personally between him and Fall prior to October 25, 1921 (R. II-831). He personally signed the letter of November 28, 1921, to Fall (Pl. Ex. 33; R. I-162). It was Doheny that Robison visited and obtained the former's promise to bid at cost (R. II-996; III-1086-87).

The conferences with Bain at Los Angeles were participated in by him and he there again repeated the statement he had made to Fall and Robison that his company would submit a bid (R. II-727, 742, 838). He was in touch with Cotter by telegram when Cotter was submitting the proposals for the April 25th, 1922, contract (R. I-239).

Doheny himself decided it was unimportant to procure the opinion of the Attorney General upon the legality of the contract of April 25, 1922; and hence Bain's letter of May 12, 1922, to Fall was never sent (R. II-784-87).

In the summer of 1922 it was to him that Fall wrote about granting permission to suspend drilling on the Pan American leases (Pl. Exs. 141, 142; R. II-584, 585).

It was he who took up the new plan which involved the lease of December 11, 1922, with Fall personally (R. II-789, 868; Def. Ex. R-4; R. II-1015, 1021; R. III-1137; Def. Ex. G-5; R. III-1155).

He attended the first preliminary meeting in the negotiations leading up to the contract and lease of December 11, 1922, and having heard the preferential right being discussed, he left and took no further part until the impasse about royalties (R. II-791-92).

It was he who with Fall personally later settled the royalties which were to go into the lease of December 11, 1922 (R. II-794; III-1132, 1135, 1136). He executed the contract of December 11, 1922 (Ex. C; R. I-41).

Wherever anything of vital importance arose both Fall and Doheny were personally engaged in it, and this applies to the whole course of the transactions.

11. Denby's inactivity and misapprehensions as to contracts and leases.

Much fault is found by Appellants with the conclusion of the Trial Court that Secretary Denby was not an active participant in the making of the leases and contracts and that he signed the same under a misapprehension (Finding No. 13; R. III-1398).

We have already had occasion to refer to the fact that Fall was of the opinion that the Executive Order of May 31, 1921, made all matters pertaining to the naval petroleum reserves an Interior Department matter (R. III-1062). We shall here call attention to those facts which we think fully justify the conclusion of the Court that Secretary Denby was passive throughout the negotiations and signed the leases under a misapprehension.

That Denby was entirely complacent in the surrender of the administration of the naval petroleum reserves to the Interior Department by the Executive order of May 31, 1921, appears from the letter of May 11, 1921 (Pl. Ex. 53; R. I-311), in which Fall refers to a conversation of the day before and **"to your suggestion to the President that the Secretary of the Interior be placed in charge of administration of the laws relating to Naval Reserves."** Secretary Fall's draft of the Executive order, as enclosed in the letter of May 11, 1921, transferred every vestige of authority with regard to the naval reserves to the Secretary of the Interior.

It was not Secretary Denby, but Admiral Griffin, Commander Stuart, and Assistant Secretary Roosevelt who revised that draft in an effort to safeguard the Navy's interests. (R. II-944-46.) Counsel now con-

cede that in May, 1921, Secretary Denby intended to leave to the Interior Department the handling of leases on the Naval Reserves (Appellants' Brief, p. 176).

Fall thoroughly understood that Denby did not intend to have anything to do with the naval petroleum reserves except on matters of general policy, and then only when Fall should consult him. He so definitely states his understanding of the matter in his letter of July 8, 1921, to Doheny (Pl. Ex. 12, R. I-133), wherein he says that he will confer with Secretary Denby only and that **"such consultation will be confined strictly and entirely to matters of general policy."**

So little attention had Secretary Denby paid personally to the administration of the naval petroleum reserves from the time of his taking of office on March 4, 1921, that he did not know until October 8, 1921, that there was a Fuel Oil Office reporting directly to the Secretary of the Navy and of which Commander Stuart was in charge. On that date he suddenly discovered the existence of this fuel office by noticing a letter which Commander Stuart had just written for his signature and which had been placed in his correspondence. (R. II-954-55.) Secretary Denby forthwith abolished this office. He appointed Admiral Robison, the then Chief of the Bureau of Engineering, as his personal representative and charged him with the handling of oil matters (Pl. Ex. 66, R. I-339; II-955).

On October 18, 1921, the very day on which he formally transferred fuel oil matters to the Bureau of Engineering, there was a meeting of the Navy Council at which Secretary Denby said (R. III-1176), "I want the Interior Department when a tract is to be opened in part or full, I want them to do it for the best interest of the Navy. That matter of leasing is most difficult and dangerous thing to be done. **It is full of dynamite. I don't want to have anything to do with it.**"

In this regard it is interesting to note that this significant statement which Secretary Denby made with regard to the "dynamite" that was in the oil leasing business is not referred to in the Appellants' brief, although their counsel repeatedly refer to Secretary Denby's so called activity in the matter of the naval petroleum reserves.

When Robison and Fall had conferred in late October, 1921, and Robison in collaboration with Fall had drafted the so called policy letter of October 25, 1921 (Pl. Ex. 24, R. I-146) for the signature of Secretary Denby, the latter wanted the seventh paragraph, which reads: **"That all leases and contracts * * * will be arranged and consummated by the Interior Department, copies of same being furnished to the Navy Department as a matter of information and record only,"** inserted therein (R. II-965).

Secretary Denby did not attend the conference of late October, 1921, nor did he attend any other conference in the Interior Department, dealing with naval petroleum reserve matters.

It was Secretary Fall and the Bureau of Mines that sent out the telegrams in November, 1921, to lessees in Naval Reserve No. 2 in order to increase production and thereby build up a substantial oil credit.

There is nothing in the record to show that Secretary Denby had knowledge of or participated in the proceedings which resulted in the granting of relief leases in Section 1 to the Petroleum Company, unless full faith and credit be given to Admiral Robison's general statement that there was nothing that he did not talk over with Secretary Denby.

It should be noted that Admiral Robison seldom, if ever, states in his testimony what he told to Secretary Denby on a particular occasion or what was

said between them, or what effect anything he said had upon the Secretary. This bit of his testimony on direct examination is typical. He was asked whether or not he had discussed with Secretary Denby the letter of December 14, 1921, before it was sent to the Interior Department and he replied, "Witness had talks with the Secretary so frequently that he cannot state definitely that he talked this particular thing—yes, he can; **there was nothing that he did not talk over, so he must have talked over this.**" (R. II-989.)

We shall later show that Admiral Robison could not distinguish between the various persons in the Interior Department, viz., Fall, Finney, Ambrose and Bain, and could not accurately relate what had been said at the various conferences which he attended. For this reason we do not feel that much weight should be given to his sweeping statement that he consulted with Secretary Denby as to all matters pertaining to the naval petroleum reserves.

That Secretary Denby was not kept fully informed and was from an early date under a misapprehension as to drainage of the naval petroleum reserves appears from his statement in the meeting of the Navy Council on November 29, 1921, at which meeting Admiral Robison was strongly advocating the reserve fuel storage plan and had directed the attention of that meeting to Mr. Doheny's proposition of November 28, 1921. On that occasion Secretary Denby referred to a statement made to him by Secretary Fall that **if they didn't tackle it now they would not get any oil three months hence** (R. II-973). There is nothing in the record to justify such a statement by Fall, since it stands admitted that there was not at that time or later a serious threat of drainage to Naval Reserve No. 1. Secretary Denby never knew the true status as to the possibility of drainage.

In November, 1921, Fall instructed Bain to work out

the fuel oil storage plan and, pursuant to said instructions, Bain got in touch with Cotter and Dunn in December, 1921, before his trip West. The results of these conferences were reported directly to Secretary Fall. There is nothing in the evidence to show that Secretary Denby had any knowledge of them.

Secretary Denby did not take part in any of the negotiations in the Interior Department with the prospective bidders, and the specifications of March 7th expressly provided that the Interior Department should be the contracting party on behalf of the United States (Pl. Ex. 136; R. II-577).

On December 14, 1921, there was prepared for the signature of Secretary Denby a letter to the Interior Department requesting the latter to proceed with the fuel oil storage plan. That letter was prepared by Admiral Robison for the signature of Secretary Denby in accordance with the established practice of the Department. (R. II-960, 989, 1023; R. III-1136.) Admiral Robison testified that Secretary Denby knew what was in every letter prepared for his signature before it was permitted to go out from the Department (R. II-989-90). An excellent evidence that Secretary Denby did not know everything that went into a letter is his letter to Senator Harreld of April 20, 1922 (Pl. Ex. 274; R. III-1177). It is sufficiently important to quote it. It is as follows:

“THE SECRETARY OF THE NAVY

“*Washington*

“APRIL 20, 1922.

“*Hon. J. W. Harreld,*
“*United States Senate.*

“MY DEAR SENATOR:

“Replying to your inquiry of April 14, wherein you request information concerning the oil leases

executed with regard to the naval reserve lands belonging to the Government since March 4, 1921, the following data are submitted:

"The Executive order transferring the care, custody, and operation of the naval reserves to the Department of the Interior, was signed May 31, 1921, and since that date the Navy Department is not in a position to give the details of leases that may have been executed. However, between the dates of March 4, 1921, and May 31, 1921, it appears that two leases became effective, as shown below:

Lease No. Visalia 09312.
Delivered: April 19, 1921.
To: Consolidated Mutual Oil Co.
Date of Lease: February 16, 1921.
Located at: S $\frac{1}{2}$ NE $\frac{1}{4}$ and S $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$, sec
28, T. 31 S., R. 23 E., M. D. M.
120 acres.

Back royalty paid to Government.... \$171,664.34.

Lease No. Visalia 09305.
Delivered: March 31, 1921.
To: Buena Vista Oil Co.
Date of Lease: August 23, 1920.
Located at: Two wells in N $\frac{1}{2}$, SE $\frac{1}{4}$, Sec. 32,
T. 31 S., R. 24 E.

Back royalty paid to the Government \$294,606.71.

"I trust that this information will serve your purpose. It is quite incomplete, of course, but accurate details as to the leases that have been entered into since May 31, 1921, can only be obtained from the Department of the Interior.

Sincerely yours,

EDWIN DENBY."

That letter was confessedly written after the Mammoth lease of April 7, 1922, leasing Reserve No. 3 in Wyoming, had been executed by Denby. It was confessedly written at a time when Robison says Denby knew all about the Pan American transaction. Either Denby did not read this letter before he signed it, in

which case it is a fair inference that he did not read other letters prepared for him by Robison, or else he read it and assumed that it stated the situation correctly when in fact it was a total misrepresentation of the then status of leases in the naval reserves.

The letter written by Fall to Denby on April 12, 1922 (Pl. Ex. 113; R. I-403), leads us to believe that Denby had no knowledge of what was going on. In this letter Fall forwards to Denby a copy of the Mammoth lease, which Denby had signed on or before that date and with which lease Robison would have us believe Denby was fully familiar, and also encloses in the letter a brief setting forth what the Mammoth lease is all about (R. I-406). This letter is all the more remarkable because Fall takes the trouble therein to inform Denby that the latter has signed the Mammoth lease.

Robison testified that he reported to Denby the bids received on April 15, 1922, and that the latter instructed him to go ahead with Bid B of the Transport Company. He claims to have reported this decision to Assistant Secretary Finney and also to have been present when the telegram of April 17, 1922 (Pl. Ex. 120; R. I-419) was sent to Fall. That telegram reads, in part, "In opinion Ambrose, Robison and myself, Pan American alternative bid best offered and should be accepted" and "suggest you authorize closing contract with Pan American" (R. I-420). It is strange that Denby's name should have been omitted if Robison had in fact received and communicated to Assistant Secretary Finney the alleged instructions of Denby to go ahead on Bid B. Nor can it be said that by referring to Robison, Assistant Secretary Finney impliedly included Denby for the remainder of the telegram shows that when the sender meant Denby he had no hesitation about using the latter's name.

On April 18, 1922, Mr. Cotter first raised the point that Secretary Denby would have to be a party to the contract. The specifications accompanying the proposals provided that the contracting party would be the Secretary of the Interior. The formal award had been made by the Acting Secretary of the Interior pursuant to Fall's authorization. Accordingly, on April 20, 1922, Assistant Secretary Finney wired Fall asking whether they should comply with the wish of the Pan American Company in that regard or should follow the wording of the Wyoming contract (Def. Ex. FF; R. II-525). The consent of Fall to this request was given by wire on April 22, 1922 (Def. Ex. GG; R. II-526). About this time Ambrose had been sent West to consult Fall *inter alia* about the question raised by Cotter. Assistant Secretary Finney had no doubt that Fall had the power to approve or disapprove of the joinder of the Secretary of the Navy as a party. He testified that a single word to the contrary from Fall, who had left definite instructions that no contracts should be closed without his prior approval and consent, would have sufficed to put an end to that suggestion (R. II-528). Until the receipt of Fall's approval by wire it was not decided to make Secretary Denby a party.

The fact that Secretary Denby was made a party had no effect upon the manner in which the construction work under the contract was to be supervised. The letter of May 5 from Assistant Secretary Finney to the Secretary of the Navy (Pl. Ex. 129; R. I-433) expressly retains in the Department of the Interior "direct control of the oil business involved in this contract." It also expressly reserves to the Secretary of the Interior the right to recall the appointment of the Chief of the Bureau of Yards and Docks, who had been designated as the representative of the Secretary of the

Interior in handling the construction of the oil storage and the receiving of oil in the tanks at Pearl Harbor.

Just as Fall had apparently thought it necessary to call Denby's attention in his letter of April 12, 1922, to the fact that the latter had executed the Mammoth lease, so, apparently, Assistant Secretary Finney in his letter of May 5, 1922, likewise thought it necessary to call Denby's attention to the fact that on April 25, 1922, a contract had been entered into with the Transport Company (R. I-433).

Before leaving the letter of May 5, 1922, it should be further noted that Mr. Dunn insisted that the ultimate authority with reference to disputes which might arise under the contract of April 25, 1922, should lie with Fall and not with Denby. Assistant Secretary Finney testified that "one of the questions discussed was how disputes could be settled in case disputes arose between the contractor and the officers of the Navy or of any department; Mr. Dunn was very anxious and insisted that the umpire or final arbiter should be the Secretary of the Interior" (R. I-433). As a result of this insistence the above letter of May 5, 1922, was written by Finney as the Acting Secretary of the Interior and was approved by Secretary Denby on behalf of the Navy. Thus again we have a case where Denby surrendered to Fall any power that he might possess in regard to the performance of the contract.

Although Denby was made a party to the contract of April 25th, 1922, the lease of June 5th, 1922 (Exhibit F of Amended Bill; R. I-68), was executed by E. C. Finney, First Assistant Secretary of the Interior acting for and on behalf of the United States of America as lessor. The application for this lease was addressed solely to the Secretary of the Interior (Pl. Ex. 127; R. I-432) and there is nothing in the record to show that Denby took any part in the execution of this lease.

When in July 1922 it was to the interests of the Transport Company to suspend drilling operations under its leases on Naval Reserve No. 1, application for leave therefor was made directly to Fall by the Transport Company (Pl. Ex. 140; R. II-582). And permission to curtail production was forthwith granted by Fall (Pl. Exs. 141, 142; R. II-584, 585). Again there is nothing in the record to show that Denby was consulted before this decision was reached or approved the same. Furthermore, leave was generally granted to suspend drilling operations in Reserve No. 1 to other Government lessees by Fall without a scintilla of proof that Denby knew or approved of this course of action (Pl. Exs. 144-156; R. II-587-596).

We have had occasion to point out under an earlier heading in this brief that when Doheny was ready to submit the plan referred to in the letter of July 28, 1922 (Pl. Ex. 140; R. II-582), he first got into touch with Fall and the plan received the latter's approval before it came into the hands of Robison through Bain. Denby took no part in the negotiations which culminated in the contract and lease of December 11, 1922. Robison testifies that after he was forced to accept the compromise royalties previously agreed upon by Fall and Doheny, he reported to Denby and the latter, having been assured by Robison that that was the best Robison could do, told Robison to go ahead (R. III-1039); but Robison's letter of December 9, 1922, to Fall, in which the writer consents to the compromise royalties, does not refer to or mention Denby's consent in the matter and does not purport to have been written on the latter's behalf (Def. Ex. GGG; R. II-798).

Likewise, Robison testified that he took up with Denby the contract of December 11, 1922, and went

over it with him; but in his letter of December 9, 1922, to Secretary Fall (Def. Ex. GGG; R. II-799), he says that "I am going over the details of the proposed supplementary contract. This contract as now prepared appears satisfactory. I will give you definite information as soon as I have been advised by the legal authorities of the Department." Also, in his letter of approval of December 11, 1922 (Def. Ex. HHH; R. II-800), he writes that "The copy of the supplementary contract * * * has been carefully reviewed by me and by the Judge Advocate General of the Navy."

It is strange that the contemporaneous documentary record made by the witness himself should contain no reference whatever to Denby, if the latter, as the witness testified, not only was consulted about and approved of every step taken at this time, but had also gone over the contract with Robison.

It is quite evident from letters and statements made by Denby that his anxiety was that only such drilling should be done as was necessary to protect the Naval Petroleum Reserves from drainage and depletion. We have already referred to his statement before the Navy Council on November 29, 1921, which clearly revealed that Fall had alread misled him in that regard. We shall quote freely from the record in discussing hereafter the credibility of Robison's testimony in order to prove that Robison also misled Denby into believing that the lease of December 11, 1922, was for protective purposes. We refer to pages 1107, 1109, 1126-27, and 1141 of Volume III of the Record.

Finally, there is no evidence in this case whatsoever from beginning to end, that Denby ever attended any conference of any kind, character or description with any officer, agent or employee of either the Pan American companies or of the Interior Department or ever

spoke to any of them about any of the leases or contracts here in controversy. Robison testified that at the time of the execution of the lease of December 11, 1922, he introduced Doheny and Cotter to Denby in the Navy Department as the latter was affixing his signature (R. III-1041).

The foregoing facts and circumstances are sufficient to warrant the Trial Court in finding that Denby was passive and also was under a serious misapprehension when signing the lease of December 11, 1922, and the contracts of April 25 and December 11, 1922. In their attack upon that finding, counsel for the Appellants first invoke the presumption that official acts and duties have been properly performed (Appellants' Brief, p. 169); but this presumption is not conclusive and may be rebutted. The Ross case cited by the Appellants so holds. Counsel next invoke the testimony of Robison to show that Denby had knowledge of the contents and the purpose of the contracts and leases he signed (Appellants' Brief, pp. 170-74, 179-208). The value of such testimony depends upon the reliability of that witness; and accordingly we shall now consider the credibility of Robison's testimony and also of Bain's testimony.

In an obvious attempt to discredit the finding of the Trial Court that Denby was not an active participant in the making of the contracts and leases and that he signed the same under a misapprehension (Finding No. 13; R. III. 1398) and also in an obvious attempt to lend credence to the testimony of Robison that Denby acted with full knowledge in the matter, counsel quote at length from the opinion of District Judge Kennedy in the case of *United States vs. Mammoth Oil Company* (Appellants' Brief, pp. 174, 209). The answer to such an argument lies in the fact that the Wyoming District Court, which did not have the advantage of Robison's

testimony in open court but merely by depositions, gave full credence to his statements, whereas the California District Court, before whom Robison appeared in person as a witness, did not feel obligated to take his testimony at par upon this important and vital matter, *i. e.*, the participation of Denby in the negotiation of the contracts and leases and his knowledge of the contents thereof. It is not necessary to brand Denby as an "imbecile." His lack of knowledge and his misapprehension as to drainage did not arise from any lack of mental capacity, but were directly traceable to the misrepresentations and lack of disclosure of the true situation by Fall and Robison.

12. The testimony of Robison and Bain.

The validity of the defense on the facts is practically predicated upon the testimony of Robison and Bain, who were called as witnesses by the defendants.

Although J. J. Cotter, J. C. Anderson and E. L. Doheny, Sr., figured prominently in the conduct of the negotiations resulting in the contract of April 25, 1922, and the contract and lease of December 11, 1922, yet this Court, as were the Courts below, is denied the benefit and aid of their testimony. Their absence from the witness stand not only gives ground for unfavorable inferences, but is also fatal to the Appellants' case, because the Trial Court was justified in not accepting the testimony of Robison and Bain as to certain matters.

The findings of fact and the memorandum opinion establish that the Trial Court did not feel bound to accept the testimony of Robison and Bain on certain issues. How far their demeanor and manner of testifying affected the Court in its appraisal of their testimony is not known and is not within the province of a brief before an Appellate Court, which has not had the

opportunity of observing the witnesses on the stand. But we shall here call attention to many substantial contradictions, inconsistencies and inaccuracies in their testimony.

That a Court ought not to feel bound by Robison's testimony on crucial facts is, amongst other things, supported by his attitude, which was certainly that of an ardent advocate of the contentions of the defense and by the fact that he was deeply involved in all the transactions, and therefore, naturally inclined to defend them.

When questioned upon cross examination about his testimony on a prior occasion, he replies (R. III-1077):—

"I can answer that question as follows: I have made a large number of formal statements on oath or on honor concerning this matter. I have never made any attempt to make one statement agree with another and I don't intend to begin along that line. If you ask me a question as to my present recollection you will get an exactly correct answer for the moment. If you ask me what I testified at some other time, I don't know."

Later, in explaining his failure to remember a statement made in his direct testimony, the witness exclaims (R. III-1095):—

"I am afraid I am suffering from senility. I don't recall."

Not only did Admiral Robison not know what he had said on prior occasions, but he could not recall with whom he had spoken or conferred. He testified that shortly after his appointment as Chief of the Bureau of Engineering he conferred with Fall upon the question of building storage with royalty oil. He fixed with great circumstantiality October 9, as the date of the first meeting and added that he was in constant touch with

Fall from that time forward (R. III-1051, 1110); but this was impossible, because it is admitted that Fall did not return from the Pacific Coast until October 17, 1922 (R. III-1110). Likewise, he erroneously believed that Director Bain attended the October 22, 1925, conference (R. II-830; III-1051). This too, was physically impossible as Bain was not in Washington (R. II-830-31).

He also testified that he saw Fall during December, 1921, and told him about his conference with Doheny, Sr. He did not remember that Fall left Washington for the West on December 1, 1921, but thought that he had left at the end of the month—evidently believing that Fall went home for the holidays or something of that kind (R. III-1086). His naive explanation of this admitted error was that he did not and had never differentiated between Fall and Finney because the Interior Department was a person to him (R. III-1086). He confessed that he had no independent memory as to whom he had talked concerning Doheny's promise to bid in December, 1921, adding that the man who was important to witness was Denby (R. III-1086-87). He concluded that he had told this important fact to either Fall, Finney or Bain—his best recollection being that it was Fall (R. III-1087).

Having thus sought refuge in the statement that to him the Interior Department was a person, Robison described that person as the complete tool of the witness (R. III-1086, 1087). Although he strongly protested that Fall, Finney, Bain and all the rest of them were tools and were under the hand of witness, yet we shall have occasion later to show that the tool became for the nonce the master.

That Robison did not intend to begin making one statement agree with another is well illustrated by his

attempt to fix the date of his secrecy pact with Fall. In his deposition in the case of the United States *vs.* Mammoth Oil Company he stated that this agreement had been concluded with Fall in October, 1921, when they originally undertook the work (R. III-1055). At the trial, the witness testified that his present memory differed from what it was at the time of this deposition and that the secrecy pact was not agreed upon until some time in the spring of 1922, after the consummation of the contracts (Mammoth and Pan American) (R. III-1055). He recalled that counsel for the Government had during the taking of the Mammoth deposition called his attention to a memorandum by C. S. Williams, dated November 4, 1921; and although he refused to change his present testimony, he nevertheless admitted that this memorandum seemed to indicate that his previous recollection was more accurate (R. III-1055-58).

He was being cross-examined upon his contradictory statements in regard to the letter of April 12, 1922, in which Fall recommended certain proposed legislation to Denby (Pl. Ex. 102; R. I-393). In the Mammoth deposition he had testified that he had recommended to Denby that the letter be disregarded because witness was going to get a bid—he had it (R. III-1092-93). Robison confessed the obvious inaccuracy of that statement and then remarked (R. III-1093):

“As to the accuracy of his recollection about all these various matters, he would prefer to let the record speak for itself. It is as accurate as he can make it and **he has been prayerfully intent to make it correct.**”

In his direct examination Robison was shown a letter dated December 14, 1921, which he read and said it referred to a conversation with Doheny, Jr. He was thus enabled to fix Washington, D. C., as the place,

and December, 1921, as the month of his interview with Doheny, Sr., on which occasion the latter promised to submit a bid without profit upon the Pearl Harbor project (R. II-993-96). The witness stood firmly upon this recollection, but refused to say under cross-examination that Doheny was wrong in his testimony before the Senate Committee in stating that the conference took place in New York in the home of E. L. Doheny, Jr., and in the winter. Robison could not recall seeing either of the Dohenys in New York City at or about the latter part of January or February, 1922, but would not say that he did not do so. However, he knew that he didn't go to New York "especially for that purpose to see anybody" (R. III-1115-16). Under an earlier heading of this brief we have called attention to those facts and circumstances which in our opinion uphold the accuracy of Doheny's recollection and the inaccuracy of Robison's memory in this regard.

Director Bain was also closely connected with the making of the contracts. His natural attitude was one of hostility to the Appellee's case. He had, moreover, displayed throughout an extraordinary attitude towards the Government's interests as contrasted with those of Doheny.

In the letter he prepared to be sent to Fall on May 12, 1922, he said, "There is, however, another phase to it. **None of us want Mr. Doheny to get into trouble, and I take it we will want to do anything we can to make it easy for him.**" (R. II-785.) This letter shows great concern lest Doheny get into trouble, but no concern lest the Government get into trouble.

And again, "Out of all this has come the suggestion repeatedly that the opinion of the Attorney General be obtained as to the legality of the contract. **I realize the objections to asking such an opinion,** but I have

thought it proper to let you know the difficulties that are being raised here so that you might reconsider the matter and decide as to whether you might not properly ask the Attorney General to put in writing what I have understood was his informal and verbal expression of opinion favorable to the action the department has taken. I am not certain that Mr. Doheny cares, but Mr. Cotter will see him tomorrow, and if it does seem to them important I am giving Mr. Cotter this letter to show you, so that you may know what I have found out here" (R. II-786). Dr. Bain's explanation of the phrase "the objection to asking such an opinion," which he used in this letter (R. II-787) is, we submit, not satisfactory or convincing.

Director Bain is also inaccurate in his recollection of important matters. He testified during his direct examination, that some time in October, 1922, he received from Fall the memorandum submitted by Mr. Doheny, Sr., relating to the California oil situation (R. II-788-89). His attention was directed in cross examination to his letter to Senator Smoot of November 30, 1923 (Def. Ex. WWW), which contained the statement that this memorandum had first come into his possession in August, 1922 (R. II-868). The witness admitted that his letter to Senator Smoot took about three weeks to prepare (R. II-863). His explanation of this mistake in date is that he has since checked the date; but he does not explain what he found in said checking to change his memory or what was the occasion for so checking.

This same letter to Senator Smoot also contained the statement that certain leases had been granted upon the Naval Oil Reserve in order to increase the amount of Government royalty oil that would accrue and thereafter become applicable to the contract of April 25,

1922, thereby shortening the time "the contractor would need to wait to secure a return of the money he needed to construct immediate storage facilities" (R. II-863). The attention of the witness was called to this statement after he had testified on cross examination that the purpose of these leases was not only to supply more royalty oil to the contractor, but also "to anticipate the fact that the Government would have to take care of drainage on these particular pieces of land." The explanation of this inaccuracy is short but unconvincing. It is that in writing the letter he over-looked the other idea that was in his mind as to making these leases. He does not, however, suggest that he has checked his earlier recollection, recorded at a time when the event should have been more freshly in mind.

The recollection of Robison and Bain in regard to their conversations and conferences together is often flatly at variance. For example, Bain testified during his cross examination by Government counsel as follows (R. II-875):

"Admiral Robison said to witness words to this effect: 'Well, the matter is settled; we are going ahead with the additional storage. The Navy Department badly needs additional storage at Pearl Harbor. **It is not certain how long I may hold my present position. Administrations change, and if the matter is postponed, the acquirement of storage may never be accomplished.** It has been decided to go ahead at once with an additional project for 2,700,000 barrels at Pearl Harbor.'"

Admiral Robison commented upon this statement by Director Bain in the following manner (R. III-1125):

"Witness thinks that is what he said because that is what he felt at the time and undoubtedly he was speaking freely and frankly with those people, **but witness doesn't think he ever said to**

anybody it was uncertain witness might hold his present position—that administrations change and if the matter is postponed, the requirement of storage may never be accomplished."

Again, Director Bain on direct examination described his visit in January, 1922, at Los Angeles with the officers of the Union Oil Company, and then stated that plans for the Pearl Harbor project "were not left with the officials of this Company for the reason that **it seemed to the witness improbable that they would be sufficiently interested to warrant it.**" (R. II-741-42.) Shortly after his return to Washington in late January, 1922, Bain met Robison and Fall in the latter's office and told them the result of his conversations with the various oil companies on the Pacific Coast, enumerating Standard Oil, Associated and Pan American as the prospective bidders he had secured for the Pearl Harbor project (R. II-743). In speaking of this January conference, Robison testified under cross examination (R. III-1084):

"He did not tell witness that the Union had given him the impression that they did not want to bid—witness got quite a different impression. Witness' understanding was that the Standard Oil Company had made objections that Dr. Bain thought were but temporary, but that the General Petroleum Company and Associated would bid, and the Union would bid if they were given a chance, but it was not thought proper to have other than a completely American Company engaged in this project."

Director Bain testified in his direct examination for the defense that at this same January conference he told Fall and Robison of the objections of one kind and another which had been raised in his conferences with the various oil companies and made mention of the objection raised by Mr. Weil and Mr. Sutro against the

legality of his proposal (R. II-743). He further testified that Fall stated that the Judge Advocate's opinion was sound, that the power to exchange was broad enough for this purpose and that Mr. Weil was perhaps advising his client on the basis of a cautious lawyer who desired to keep his client from getting into any possible trouble (R. II-744). Such testimony does not accord with the following statement by Admiral Robison on his cross examination (R. III-1083):

“When Dr. Bain came back from California in January, the witness thinks ‘1922,’ he heard from him of a lawyer who had expressed doubts as to the legality of this project—only one—a man named Sutro. The witness does not think that he knows the name of Mr. Weil in that connection. At that time when Dr. Bain got back, he expressed the belief to witness that all of those concerned, with the possible exception of the Standard Oil Company on account of some objections that he thought were but temporary, of their Company—witness thinks he gave the name of Sutro—would furnish bids in accordance with these specifications. At that time in January, witness believed that the attorneys of the Associated Oil Company and the General Petroleum Company had approved the plans. That was witness’ understanding at that time—that the General Petroleum Company and the Associated Oil Company, both were supporters of the plan that witness and Dr. Bain were figuring on.”

But Bain well knew that the attorney for the General Petroleum Company had not approved the plans and that the Company was not a supporter of the plan. In his direct examination he testified that upon his return to Los Angeles from San Francisco he again met the officials of the General Petroleum Company and on this occasion (R. II-740):

"They did not get very far in discussing the Pearl Harbor matter, because Mr. Weil promptly announced his opinion that it was illegal, and that he would advise his Company to have nothing to do with it. He said that if the power to exchange went as far as the Judge Advocate's opinion indicated that it did, then it was an unlimited power to exchange, and that it would give the Navy authority to exchange oil for a battleship, if they desired to do so, and that he was satisfied that that was without the intent of Congress. He furthermore stated that if the Judge Advocate General was wrong, that there would be no statute of limitations to protect his Company."

Director Bain concluded his direct testimony upon his conferences with General Petroleum Company by saying (R. II-741):

"The conversation in Los Angeles closed the matter, so far as the General Petroleum Corporation was concerned, the upshot of that being that the officials of that company told Dr. Bain they would not be interested further."

During his cross examination, Director Bain described this second conference with officials of the Petroleum Company and then said (R. II-841):

"And Mr. Weil expressed very grave doubts, graver than Mr. Sutro; the latter apparently had not made up his mind; Mr. Weil asked why the opinion of the Attorney General was not obtained; witness does not remember Mr. Weil saying that his Company would not consider it unless the opinion of the Attorney General was obtained, but would consider it if the Department got that opinion; witness would not say Mr. Weil did not say that."

The testimony of Mr. Weil corroborates Bain's testimony that the General Petroleum Company had not

approved the plan and was not a supporter of it. Whether or not Bain told Robison of this fatal objection cannot be so easily determined.

Admiral Robison is positive in his assertion that Doheny, Sr., attended but one conference during the negotiations leading up to the contract and lease of December 11, 1922. He places that conference toward the end of the period between November 29th and December 11th, 1922. He testifies on direct examination that (R. III-1025):

“ * * * there was one conference at the Bureau of Mines, where Mr. Doheny was present; between November 29 or 30 and December 11, there were conferences on this subject about twice a day, at but one of which was Mr. Doheny present, and that was in the office of the Director of the Bureau of Mines, Dr. Bain; that conference was toward the end of the negotiations.”

He identifies this conference as the one at which he in vain endeavored to persuade Doheny to raise the royalties previously agreed upon by Fall and Doheny (R. III-1030-32). Bain agrees with the testimony of Robison insofar as the latter testifies that Doheny attended a conference where the compromise royalties were discussed. He disagrees as to the date of that conference—Bain stating that Fall had previously received Doheny's letter of December 8, 1922 (Pl. Ex. 167; R. II-619), and Robison stating that Fall was expecting such a letter (R. II-795; III-1031).

A more important inconsistency in their testimony is that Bain states that Doheny, Sr., also attended the first meeting in the series of negotiations culminating in the execution of the contract and lease of December 11, 1922. On this occasion (R. II-791-92):

" * * * there was a general discussion of what it was proposed to do, and how it should be done, and the preference right and its restriction to the eastern part of the reserve."

The witness then continues to say that following the general discussion, Doheny left and through a series of days there were discussions participated in mainly by Anderson, Cotter, Ambrose, Robison and himself. The significance of Doheny's attendance at these two meetings is apparent. Having ascertained in the first instance that his preference right under the contract of April 25, 1922, was before the negotiators, it was not necessary that he further attend the preliminary steps in the negotiations. After the parties had agreed upon everything except the royalties and an impasse had been reached in that regard, Doheny once more appeared on the scene and took a firm position as to the royalties which Fall and himself had fixed. This was the occasion when Robison for the first time realized the value of the preferential right (R. III-1097, 1132, 1135-36).

It would seem appropriate at this point again to advert to the statement by Admiral Robison that Fall thought that the Executive Order made the administration of the naval petroleum reserves an Interior Department affair. His exact language in this regard is (R. III-1062-63):

" * * * and Secretary Fall was of the opinion that the Executive Order made it an Interior Department affair. Witness found that he was able to advance the Navy business best by yielding entirely to the Secretary's view in that matter on all unimportant details. Whether the witness ever had any serious disagreement with Secretary Fall about an important detail depends on what one calls important, but the witness thought that he accom-

plished the Navy's desires to an extent that he had not originally contemplated."

Apparently, the witness did not consider royalties of prime importance or else he could not have boasted, as he did, that Fall, Finney, Bain and the rest of the people were tools—a complete tool of the witness (R. III-1087).

Admiral Robison constantly reiterated throughout his direct examination that he always discussed with Denby all matters pertaining to the naval petroleum reserves, that he kept the latter fully informed as to everything and took no action whatever without Denby's previous knowledge and consent. His own testimony shows that this could not have been true. He frankly confessed that Denby executed the contract and lease of December 11, 1922, under the mistaken notion that drainage rendered such a step imperative and also that he not only fostered this erroneous idea, but actually was responsible for it. The witness testified upon cross examination as follows (R. III-1107):

" * * * that to him that is the most important result in that lease, but that lease could not have been accomplished had witness been unable to say to the Secretary of the Navy that it involved the drilling of no lands that he did not consider it necessary to drill in order to protect government property from drainage to outside concerns."

(R. III-1109):

"Q. 'Now what was that you said to me, that you couldn't have gotten Secretary Denby's consent to this lease if you hadn't been able to represent to him that it was necessary to make it on account of drainage?'

"A. That there was no property leased that was not liable to drainage by outside concerns.'"

(N. B. Because the transcript in the Record has a line dropped out, counsel for the United States has taken the liberty of correctly setting forth the above question as it appears on page 1822 of the official stenographic transcript of the testimony.)

Admiral Robison attempts to put a semblance of truth upon his statement by adding (R. III-1109):

"Witness did not tell him it was liable to immediate drainage and did not think he used the term about this 300 year period before this moment. Witness did not tell Secretary Denby any period that it was likely to be drained out in, and the Secretary did not ask witness."

The following quotations from the testimony of Robison bear further upon Denby's mistaken notions about drainage:

(R. III-1126-27.) **"To the mind of the Secretary of the Navy witness believes the most important advantage was that permanent security against drainage would be secured. Witness is unable to state that, but to witness the most important advantage was the provision of security to the nation."**

(R. III-1141.) **"Mr. Denby had a fixed idea that the immediate necessity was the drilling of offset wells where they were required. Witness thinks that it was his idea to keep as much of the oil in the ground as long as he could, and the policy of his department was fixed by him."**

Apparently, Fall also preached to Denby the danger of immediate drainage. At the meeting of the Navy Council on November 29, 1921, Denby said (R. II-973):

"The Secretary of the Interior says if we didn't tackle it now, we would not get any three months from now."

In plain disregard of this testimony as to Robison's and Fall's misrepresentations to Secretary Denby upon the question of drainage, counsel boldly proclaim that the record in the present case is bare of any representations of any kind by Fall or officers of the Navy Department to Secretary Denby with reference to or for the purpose of bringing about the contracts and leases (Appellants' brief, p. 165).

Thus did the personal representative of Secretary Denby perform his duty of full disclosure to his superior. In this regard, it may be noted that Robison wrote for Denby's signature the important policy letters of October 25, 1921, December 14, 1921 and November 28, 1922 (R. II-960, 989, 1023; III-1136).

Bain testified upon cross examination that the lease of December 11, 1922, could have waited if the Navy had not been anxious for the storage facilities (R. II-874). In this regard he testified upon direct examination (R. II-791):

"As to what, if anything, Admiral Robison said to witness regarding a lease of the reserve, or any part of it, **Admiral Robison said that the Navy would lease the whole reserve if they got enough for it.**"

But Robison, when confronted during his cross examination with this testimony, branded it as inaccurate, saying (R. III-1108):

"Witness does not think that he ever said to anybody that if they had to lease up the whole reserve to get the storage project done, he was prepared to lease it all * * *."

This is but another instance of the contradictory statements made by Robison and Bain, upon most vital matters.

Bain did not always state a situation frankly. On or about March 4, 1922, the witness received a letter from Charles N. Black (Pl. Ex. 95; R. I-386) enclosing a copy of the opinion of Mr. Sutro upon the illegality of the Pearl Harbor project (Pl. Ex. 51; R. I-296). He acknowledged the receipt of this letter on March 4th in a letter (Pl. Ex. 96; R. I-387) in which he said:

"I am greatly obliged to you for the copy of Mr. Sutro's opinion which I am having studied here. **I think we will be able to arrange a form of bidding which will meet the principal objections he has in mind,** and I am sure we can back our plan with good legal opinion, since the matter happens to have been examined by attorneys outside as well as inside the service."

His statement that he expected to be able to arrange a form of bidding which would meet the objections was untrue because on March 7th an invitation for bids was issued on exactly the same theory of a lump sum bid in barrels of oil for construction and for storage, which had been the theory since February 21, 1922. He explains this apparent untruth by the statement that in his judgment the proposals of March 7th, 1922, "met the objection that the Navy could not legally exchange royalty oil for tankage" (R. II-843). He says that the attorneys outside the department who had approved of the matter were the attorneys of Mr. Dunn's company (R. II-843). The witness is silent upon the legal opinion of Mr. Weil in January, 1922. The attorneys inside of the service proved to be only the Judge Advocate General of the Navy Department. Bain had advocated since October or November, 1921, that the opinion of the Attorney General be secured, but his request had been in vain (R. II-842). As late as May 12, 1922, the witness again repeated this request, but to no avail (Ex. EEE; R. II-784).

A further vital factor in considering the credibility of Admiral Robison and Bain is their intimacy with the representatives of the Appellant, Transport Company. The testimony of Bain is replete with accounts of the frequent visits paid to him by J. J. Cotter and Gano Dunn between February, 1922, and April 15, 1922. Both were frequently in his office and freely discussed alternative bidding, which they heartily favored (R. II-746-50; 762, 768-69, 856-58, 860-61). Robison at the very outset of his direct testimony took advantage of the occasion to flaunt his past and present friendship with the Dohenys, Sr. and Jr.; and although immediately after his appointment on October 1, 1921, he wrote Doheny a self-congratulatory letter upon his appointment, yet he professes he did not seek their aid and assistance in obtaining this promotion (R. II-954). There not having been the slightest suggestion up to that time that Doheny was responsible for the appointment, we can conceive of no legitimate reason why Robison should make such a statement.

The foregoing contradictions, inconsistencies and inaccuracies in the testimony of Robison and Bain are even more striking, if their evidence be read as given in the form of question and answer. But the written word does not and cannot record the demeanor and manner of the witness, when testifying. The Trial Court only can take this into consideration, and the findings of fact and the adjudication in the present case leave no doubt but that the learned Chancellor did not feel bound to take the testimony of either Robison or Bain at par upon certain important and vital matters.

And yet, counsel for the Appellants at page 170 of their brief have the temerity to say, with respect to certain testimony of Robison, that it came "from a source unimpeached and unimpeachable" and "from a

source commended for good faith and honesty and honorableness and patriotism by both counsel for the United States and the District Court." We believe that the above analysis of the testimony of Robison does impeach its credibility; and it hardly seems necessary in view thereof to disclaim the unwarranted assumption of counsel that we have commended that witness in any manner.

C. THE FRAUDULENT CHARACTER OF THE CONTRACTS AND LEASES.

1. The findings of the Trial Court.

Briefly summarized, the Trial Court found with respect to the contracts and leases under attack as follows:

That they were consummated as a result of a conspiracy between Edward L. Doheny and Albert B. Fall to defraud the United States of its property and rights (R. III-1365-66, 1390, 1420, 1422).

That the payment by Edward L. Doheny to Albert B. Fall of \$100,000 was *contra bonos mores*, and against public policy, and avoided the contracts which ensued (R. III-1422).

That apart from the making of the payment above mentioned there was action and conduct on sundry occasions by Fall, by Doheny and by others connected with them in the transaction which was unusual, irregular and which demonstrated the existence of fraudulent and improper motives on the part of Fall and of Doheny. Among these matters were undue and improper secrecy, the attempt to prevent open competition, the refusal to take competent legal advice, the favoring of Doheny's company in the matter of information concerning the proposed projects, and the granting of preferential rights to Doheny's company unavailable to others (R. III-

1279-80, 1365-66, 1390, 1400, 1408, 1411, 1415, 1417, 1418, 1419, 1420).

That Fall was active in all the negotiations and dominated the same and that no important decision in connection with the negotiations was made by any one else than by Fall (R. III-1397-98).

That Denby was passive throughout said negotiations and signed the contracts under a misapprehension as to the true facts (R. III-1398).

The above summarization is by no means an attempt to itemize all the separate and independent facts which the Trial Judge found as subsidiary to what may be called his main conclusions which are attempted above to be briefly summarized. In a word, the Trial Judge proceeded with meticulous care to find a great array of subsidiary facts and from these he drew certain conclusions which may properly be termed fact conclusions (R. III-1393-1427).

In the Court of Appeals the Appellants may fairly be said to have attacked most of the subsidiary fact findings and all of the conclusions of fact drawn therefrom by the Trial Court. They have now abandoned their attack upon the subsidiary fact findings and attack only two of the fact conclusions by their assignments of error, Nos. 15 and 16 (Appellants' brief, p. 98). These are the conclusions that Fall was active and dominant and Denby passive and acting under mistaken belief in their respective parts in the negotiation (R. III-1397-98). The formulation of the assignment as to Fall does not, as framed, in our judgment attack the Court's finding that there was a conspiracy, although there is a reference in it to conspiracy. The argument on the facts for Appellants seems to us, however, to challenge the conclusions as to the respective parts played by Fall and Denby in the transactions, and that as to conspiracy.

2. The review of the fact findings by the Court of Appeals.

In its opinion the Court of Appeals first states the issues, as made by the pleadings (R. III-1478-81); next carefully reviews and summarizes the facts found by the Trial Court (R. III-1481-96), and then states the legal conclusions which the Trial Court drew from the facts so found (R. III-1496-98).

Having thus stated the case the Court opens its discussion of the questions involved as follows:

"The defendants assign error to certain of the findings of fact of the Trial Court, certain of the rulings of that court upon the admission of evidence, and certain of the Court's conclusions of law. We find no ground for disturbing the findings of fact **which we deem essential to the decision of the case,** and while the evidence may be insufficient to support certain contested findings, the disputed facts, in view of our conclusions upon the law applicable to the case, become of little importance." (R. III-1499.)

It is, therefore, not correct to say as Appellants do in their 14th Assignment of Error (p. 97 of Appellants' brief) that the Court of Appeals held "that the case could be disposed of on conclusions upon the law applicable to it **without regard to the facts.**" Nor, it seems to us, are Appellants justified in saying as they do on page 164 of their brief that "the appellate court not only held that the disputed facts were unimportant in view of its conclusions upon the law applicable to the case **but also clearly recognized that the evidence was insufficient to support contested findings of fact.**"

The Court of Appeals clearly showed that it approved and confirmed the fact conclusions essential to a recovery in this case. It said (R. III-1505-6):

"The evidence is that the Secretary of the Interior and the representatives of the Department of the Navy, who were most interested and active in furthering the Pearl Harbor scheme, were doubtful of their authority to engage in it and intentionally refrained from giving out information concerning the same and withheld from members of Congress knowledge of their action through fear that they would encounter trouble from Congress."

At pages 1506 and 1507 the Court in its opinion repeatedly calls attention to the fact that the Government had been deprived of its right to make more valuable contracts than those made with the defendants; had been deprived of the benefit of competition for leases; and calls attention to the fact that the Trial Court based its decree upon the right of the United States "to be restored to the use and possession of its naval oil reserves, **which through fraud, undue favoritism and misconduct of its officers** had been relinquished to private enterprises." And the Court of Appeals adds, "We think the ground so taken by the Trial Court was justified." (R. III-1507.) The Court is at pains then to cite cases showing that pecuniary damage need not be shown by the United States in cases based upon a fraud against the United States or a conspiracy to defraud the United States.

In holding that the defendant Petroleum Company was not entitled to be reimbursed for the value of its improvements upon the leased land the Court of Appeals correctly stated that credit for such expenditures could only be allowed on the theory that the trespass was innocent and that the expenditures had been made in good faith. It then concludes (R. III-1513), "The *mala fides* of the trespasses, however, follows from the findings of the court below," and then decides that no credit shall be allowed to said defendant because

of its *mala fides* in the transactions, and reverses that portion of the decree of the lower court which had made such allowance.

The entire testimony, with minor and wholly unimportant exceptions, was taken orally in open court. This was done by the expressed desire of the Trial Judge who, under his power so to do, issued subpoenas running out of the district in order that the witnesses might appear before him and he might the better be able to appraise their testimony. The *bona fides* of practically the entire defense rested upon the oral testimony of two witnesses—Robison and Bain—called by the Appellants. There were glaring contradictions and inconsistencies between their testimony and the written records; and between their direct and cross-examinations. Their bias, their demeanor, their accuracy, their manner of testifying, as well as that of all the other witnesses, were matters of the highest importance to a correct determination of the facts. The Chancellor heard them and appraised their testimony. No appellate court could so well do this even if the record were transcribed question and answer; for these matters do not get into cold type. Much less could an appellate court adequately do so when under the rules the testimony is transcribed into a narrative statement which to a large extent alters its significance as given in open court.

In refusing to set aside the findings of fact of the Trial Court the Court of Appeals followed the authorities.

Presidio Mining Co. vs. Overton, (1921), 270 Fed. 388, (9th C. C. A.).

wherein it is said:

"In *American Rotary Valve Co. v. Moorehead*, 226 Fed. 202, 141 C. C. A. 129, in the Circuit

Court of Appeals for the Seventh Circuit upon a petition for rehearing the appellant claimed that the court in affirming a decree of the District Court without filing a written opinion had either expressly or impliedly held that, under the new equity rules, the decree of the trial court upon a disputed question of fact was binding upon the appellate court. In answer to this objection, the court said:

“ ‘We had no intention of being so understood. Under the new equity rules, as well as under the old ones, the reviewing court has the right, and owes to itself and to the parties, the duty, of trying the question of fact *de novo*. Under the old rules, the findings of the trial court were entitled to be treated as very persuasive, and such findings were not to be disturbed, unless it appeared quite clearly that the trial court had either misapprehended the evidence or had gone against the clear weight thereof. We conceive that the new rules have made no change in those respects. Cases now are ordinarily to be heard by the trial judge in open court, while formerly they were ordinarily referred to a master. But under either set of rules, if the witnesses have been heard in open court, one element that rightly enters into the reviewing court’s consideration of the evidence *de novo* is the opportunity of the trial judge to estimate the credibility of the witnesses by their appearance and demeanor on the stand. *Espenschied v. Baum*, 115 Fed. 793, 53 C. C. A. 368.’

“Also *Westermann v. Dispatch Printing Co.*, 233 Fed. 609, 147 C. C. A. 417, where, in an equity case on appeal, Judge Denison for the Court of Appeals of the Sixth Circuit said:

“ ‘It follows that we must decide the questions of fact as well as * * * of law, * * * save that, under familiar rules, the conclusion of the trial court on questions of fact will not be lightly disturbed.’

"This is the established rule of this circuit. We believe this to be a correct statement of the equity rule. Where evidence is conflicting and the trial judge has had the opportunity of seeing the witnesses, observing their demeanor, while testifying, judge of their candor and intelligence, and thus be able to determine their credibility and the weight to be given to their testimony, the finding of the trial court is persuasive and presumptively correct, but not conclusive. U. S. v. Grass Creek Oil & Gas Co., 236 Fed. 481-484, 149 C. C. A. 533." (p. 390.)

The above language we think expresses the rule, as to which there is no contrary view either in Federal or State Courts, with regard to the review of the record in an equity case.

3. The doctrine of this Court as to the review of fact findings.

The cases cited by Appellants (p. 164, ff. of their brief), as well as a number of others in this Court, clearly demonstrate the rule to be as stated in

Norton vs. Larney, (1924), 266 U. S. 511.

(p. 518): "The well-settled rule of this Court is that where two courts have reached the same conclusion upon a question of fact it will be accepted here unless clearly erroneous."

Adamson vs. Gilliland, (1916), 242 U. S. 350.

(p. 353): " * * * the case is preeminently one for the application of the practical rule that so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' Davis vs. Schwartz, 155 U. S. 631, 636."

Moreover, we submit that the facts appearing in this Record which we have above pointed out and summarized, clearly sustain the conclusion of Judge McCormick in the District Court, stated in his opinion as follows (R. III-1365-66):—

“To sustain these contracts and leases in view of the multitude of irregularities, favoritisms, discriminations, improprieties and wrongs shown by the record in this case is more than this court can do. Some of the specific means alleged to have been employed by Secretary Fall and Mr. Doheny to consummate the conspiracy have not been proven by the evidence in this case, but in general the allegations of fraud and conspiracy have been established. In my opinion it has been clearly proven that as early as November 28, 1921, there was a secret definite understanding, arrangement and agreement between Secretary Fall and Mr. Doheny that the companies controlled by Mr. Doheny would be given extensive and valuable oil leases in the naval petroleum reserves in the consideration of the building of the storage facilities at Pearl Harbor, Hawaii, and the filling of the same with fuel oil, and that all of the contracts and leases in controversy in this suit were and are the outgrowth, development and accomplishment of such secret plan.”

“My conclusion upon the issue of fraud and conspiracy is that the charge thereof alleged in the amended bill of complaint has been sustained and that the contracts and leases involved in this controversy must be cancelled, annulled and set aside.”

No one can read Judge McCormick's carefully phrased findings and conclusions of fact and his detailed discussion of the evidence without realizing that he gave to every element in the case the most careful and painstaking consideration, and weighed each element with care. The matter was argued before him on behalf of Appellants for days. The argument in the Court of

Appeals was full, ample and protracted. Certainly it would seem that Appellants ought not now to ask this Court to hold not merely that it would not have found as Judge McCormick did on the evidence before him, but that there was no evidence to support his findings.

We have above (p. 9 to p. 134, this brief) attempted with some care to point out the badges of fraud in this case and to demonstrate actions and conduct on the part of the parties most concerned in the transaction, constituting badges of fraud, and wholly inconsistent with innocence and fidelity to the interests of the United States. We do not propose here again to summarize and repeat them. We can only say that it was with these matters in mind that the fact findings were made.

4. The personal financial transactions between Fall and Doheny avoid the contracts and leases.

(*Points XII and XIII, Appellants' brief, pp. 273 and 300.*)

The Appellants, realizing the necessity, if they are to succeed in this cause, of eliminating the effect of the \$100,000 transaction between Fall and Doheny, attempt to eliminate it from the case in several ways. We have given the facts with regard to this transaction *supra*, pp. 36 to 50. We desire here only to deal with the legal argument addressed to the effect of these facts.

We shall attempt to deal with three positions taken by Appellants in treating of this transaction, although we shall not deal with them in the order stated in Appellants' brief. We desire in a word first to answer the fact argument made by the Appellants concerning this matter.

They first allege that the transaction was a *bona fide* loan and not a bribe. We do not propose here to rehearse the facts. We wish merely to say that it is simply inconceivable that this transaction was the innocent and upright transaction which Appellants seek to label it.

The second position,—that argued in Point XII of Appellants' brief,—is that Secretary Denby was not a party to this fraudulent money transaction, and if he was not a party to it, it can have no effect on his active and independent conduct in connection with the making of the leases and contracts, unless it brought about some misrepresentation which affected his final action. We have above attempted to show that Secretary Denby was not informed and active in what he did in this connection; but we assert that it matters not whether he was informed or ignorant, if a corrupt money transaction took place with a Government official, thought and believed to have influence or power in connection with the making of these contracts and leases. The innocence or ignorance of the official having final power, and the fact that he acted without knowledge or improper influence or misrepresentation due to the corrupt transaction cannot save the contract.

The third position, which is taken in Point XIII by Appellants, is that if the power to act was by law reposed in Denby and not in Fall, and Denby did in a formal way act, the Court must shut its eyes to all that went before and led up to Denby's action,—to all the impropriety in the conduct of Fall and Doheny, because, forsooth, it is not alleged that Denby was bribed or that he knew anything about the financial transaction between Fall and Doheny.

If fraud, corruption, or a transaction contrary to good morals was the genesis or the means intended to bring about a Government contract, or to affect any official connected with its making, that contract should not and cannot stand.

The Trial Court held that the financial transaction between Fall and Doheny vitiated the subsequent contracts in the making of which Fall participated, whether

it was a bribe, a gift or a loan (R. III-1303, 1316). We have already pointed out Mr. Doheny's statements to the Senate Committee to the effect that he realized that such a transaction would tend to make Fall favorable to him and to his companies in any transaction with the Government. It did not need Mr. Doheny's admission to develop this fact. We are all familiar with human nature. We know what human motives and purposes are and how they are influenced.

The Appellants certainly realize, and their whole brief on this point shows that they realize, that the transaction in and of itself is indefensible. They take refuge, as they must, in the proposition that however wrong the transaction was **it did not in fact affect the subsequent dealings between Doheny's company and the Government.** Thus they argue that the negotiations pending between Fall on behalf of the Government and Doheny on behalf of his company in November, 1921, came to naught (Appellants' brief, p. 278). They repeat over and over again that no action was taken under the letter of November 28, 1921. We have above sufficiently answered this contention (pp. 34-35 this brief).

Nobody can read the Record without being impressed with the constant activity of Fall in these matters, with the fact that whenever any critical situation arose Fall stepped in, and that it was his final say which made it possible for any of these papers to be placed before Secretary Denby for his signature; that always they went to Denby from Fall through Robison, and never direct, and that Robison, as the Trial Court has found, was so obsessed with getting storage facilities built with royalty oil rather than with appropriations by Congress that he was facile to do Fall's bidding and to bring about what he wanted by whatever means Fall suggested and approved.

It will not do for a company whose president, while negotiating a contract with the Government, had an improper financial transaction with a Government official, to say that upon the Government rests the burden of proof that that transaction was the **final and efficient** cause of the execution of the contract between the company and the Government. Nor will it do for it to assert that even if the burden remains upon it, it has carried the burden by proving **that the corrupt and improper bargain made between its president and the Government official was ineffectual because, forsooth, that improper financial transaction took place between the president of the corporation and the wrong official of the Government,—the one not in final control.**

The argument comes to this: That in Governmental transactions, if a contractor with the Government makes a gift or pays a bribe or makes a personal loan to an official of the Government, knowing that that official will be influenced thereby; if perchance it turns out that that particular official, albeit he was active in the matter, did not have the final say and the final decision as to the contract, **then the corporation is fortunate enough to have dealt with the wrong man and the Government is bound by the contract whether it will or no.**

It comes to this: The Appellants ask this Court to say first, that there was no impropriety in the transaction between Fall and Doheny on November 30, 1921. Second, that if there was such impropriety, it did not have any effect on what was ultimately done. Thirdly, that even if it did have some effect, that effect must be disregarded because the making of the contracts and leases was participated in by an innocent official of the Government, thus neutralizing the wrong which had been done by the improper financial transaction.

As we shall point out from the authorities, there is but one rule which should and can be applied by courts to such a situation. The moment a court is convinced by clear and indubitable proof that such a transaction occurred between a Governmental official and a contracting party, it will nullify and set aside the dealings between the Government and such contracting party, in which such official participated, on the ground that they are all infected by the improper transaction, and that no court, in ease of the contracting party, will stop to appraise the effect and the harm that has been done by such improper transaction.

Appellants must and do ask this Court to say to this Appellee and to the people of the United States that such a transaction as admittedly here took place either is not in itself unlawful or to be reprehended, is not offensive to good morals and proper dealing by Government officials, or, in the alternative, they ask this Court to say that while such a transaction is immoral, is wrong, and should be reprehended, yet the Court will make inquiry in ease of the wrongdoer to see if his wrong actually affected the conduct of some official who was not cognizant of it. We apprehend that no court ever has held such a proposition. Appellants cite no text-books and no case for any such proposition.

The authorities are clearly in favor of our contention.

Mechem, Public Officers, p. 246, Sec. 368.

"Contracts leading to violation of duty are void.
So any contract which has for its object or consideration, or which naturally and legitimately tends to induce a public officer to neglect, ignore, violate or exceed his official duty, or to make him less zealous, earnest or diligent in its discharge than the law requires, is contrary to public policy and void."

In reference to the confidential relationship existing between an agent and his principal and the duty of the agent to serve the interests of the principal free from outside inducement, the statement of **Kerr on Fraud and Mistake (5th Ed.) page 180**, may be cited:—

“Where a person in the employment of another is bribed with a view to inducing him to act otherwise than faithfully to his employer, the agreement is a corrupt one and unenforceable whatever the effect produced on the mind of the person bribed may be.

“* * * An agent cannot bargain for any benefit derived from the subject on which he is employed without disclosing the fact to his principal. Commission received by an agent without the knowledge of his principal is looked on as a bribe. It is a profit which the principal has a right to extract from the agent whenever it comes to his knowledge. The rule is the same whether the remuneration received by the agent formed part of the original bargain, or was a present for services rendered; or whatever the form which the secret profit may take.”

We need not stop to discuss whether the transaction was a “loan” or a “gift.” We have discussed that matter elsewhere. Whatever it may be called, it is still true that the money was paid with a full realization that it would tend to influence Fall in his official capacity. And it is clear that the transaction put Fall irrevocably in Doheny’s power. Such a transaction was certainly a “bargain for a benefit” and certainly **tended** to induce Fall to neglect, ignore, exceed or violate his public duty. Whatever Fall’s actual and legal relation to the contracts of April and December, he was then in fact an officer of the United States and active in the consummation of the contracts. Any duty he sustained in this

behalf was a public duty, whether he acted *de facto* or *de jure*.

In connection with Appellants' contention that if Fall had not the **legal power** to act Doheny's transaction with him can have no effect upon the validity of the contract, we cite:—

Crocker vs. United States (1915), 240 U. S. 74.

Here suit was brought on a contract for furnishing certain satchels to the Postmaster General. The facts were that by public advertisement the Postmaster General solicited bids for furnishing satchels for a period of four years. Shortly after the advertisement the company, here represented by its trustee in bankruptcy, and one Lorenz, entered into a written agreement whereby the company employed Lorenz to assist in securing the contract. The agreement was further that if the company got the contract Lorenz should receive a certain share of the profits. Lorenz and a confederate then entered into a secret agreement with one Machen, the superintendent of free delivery service, having important duties relating to the purchase of satchels, whereby in the event the company got the contract Lorenz's share of the profits was to be divided one-half with Machen. The company made its bid, which was accepted by the Postmaster General.

A contract was made in due course. A large number of satchels were furnished under the contract. They were accepted and retained by the Post Office authorities. When payment was requested it was refused because the Postmaster General had learned of the corrupt arrangement by which Machen was to share in the profits, and rescinded the contract. The company itself was innocent, except that it was chargeable with the knowledge of what was done by Lorenz and its vice-president,

Crawford, who had entered into the arrangement with Lorenz.

This Court affirmed a judgment of the Court of Claims denying a recovery on the contract, and said (p. 78):—

"We are of opinion that in the transactions out of which the claim arose there was an obvious departure from recognized legal and moral standards. It began when the company employed Lorenz, upon a compensation contingent upon success, to secure the contract for furnishing the satchels, and it persisted until its discovery by the Postmaster General led to the rescission of the contract. Because of their baneful tendency, as here illustrated, agreements like that under which Lorenz was employed are deemed inconsistent with sound morals and public policy and therefore invalid. Dealing with such an agreement this court said in *Tool Co. v. Norris*, 2 Wall. 45, 54-55: 'All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the Government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the Government. No other consideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds. * * * Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. **The law meets the suggestion of evil, and strikes down the contract from**

its inception. There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both is the direct and inevitable result of all such arrangements.' ”

Again this Court said (p. 80):—

“The secret arrangement whereby Machen was to share in the profits was most reprehensible. Its natural effect, as also its purpose, was to secure for the company an inadmissible advantage. The satchels were wanted for the free delivery service and Machen's relation to that service made it probable, if not certain, that his advice respecting the reasonableness of the bid, the number of satchels required from time to time, and the company's performance of the contract, would be sought and given consideration by his superiors in the Post Office Department. The advertisement for bids, the postal regulations (Ed. 1902, sections 17 and 70) and the findings leave no doubt that he was charged with important duties of that character. **Public policy and sound morals forbade that he should have any personal interest in the bid or contract lest he might be tempted to advance that interest at the expense of the Government.** Under the secret arrangement, which was made before the bid was submitted, he had such an interest and therefore was in a position where the hope of personal gain was likely to exercise a predominant influence and prevent a faithful discharge of his public duties, as in fact it did.

* * *

And again (p. 81):—

“Of course, the secret arrangement with Machen operated to vitiate the company's contract and

justified the Postmaster General in rescinding it on discovering the fraud. *Wardell v. Un. Pac. R. R.*, 103 U. S. 651, 658; *Thomas v. Brownville & c. R. R.*, 109 U. S. 522, 524; *McGourkey v. Toledo & Ohio Central R. R.*, 146 U. S. 536, 552, 565; *Smith v. Sorby*, L. R. 3 Q. B. Div. 552; *Harrington v. Victoria Graving Dock Co.*, *ibid.* 549; 2 *Dillon Municipal Corporations*, 5th Ed., Sec. 773. **And this is so, even though the company was without actual knowledge of the corrupt arrangement.** It was made by Lorenz and Crawford while endeavoring to secure the contract for the company and was a means to that end. They were the company's agents and were securing the contract at its request. It accepted the fruits of their efforts and thereby sanctioned what they did and made their knowledge its own. *Krumm v. Beach*, 96 N. Y. 398, 404; *Fairchild v. McMahon*, 139 N. Y. 290; *White v. Sawyer*, 16 Gray, 586, 589; *First National Bank v. New Milford*, 36 Connecticut, 93, 101; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, 265; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5. P. C. 394, 410, *et seq.*; *Leake on Contracts*, 6th Ed., 255, 335-336; *Wald's Pollock on Contracts*, 3d Ed., 392."

Appellants' counsel seek to distinguish this case on its facts. It is perfectly clear that Machen, with whom an unlawful and secret arrangement was had, **was not the man who had the power to give out the contract.** It is equally certain that Machen did perform important functions in connection with the negotiations for the contract. So, in this case, Fall performed important functions in connection with the making of the contract, albeit he and Denby actually signed it. **The only way, therefore, that the Appellants can avoid the force of this authority is to say that the facts in the present case**

show that Fall had nothing to do with the making of the contract, and this is all they do say to distinguish it.

Garman vs. United States (1899), 34 Ct. Cls. 237.

Here suit was brought by a mail contractor for one month's extra pay for services "dispensed with." The suit was on a contract for carrying the mails. After the contract was made the Postmaster General ordered that the service be expedited, thus raising the compensation to be paid to the contractor by a very large amount. It appeared by evidence in the cause that while the plaintiff's application was pending in the Post Office Department for the expedition of the services he offered \$20,000 to a certain person to secure the proposed expedition on both routes, and that on the expedition being ordered he paid the money, partly in cash and partly in drafts and notes, which were subsequently paid. The Court of Claims dismissed the suit, holding that the payment of the money tainted the transaction and that the plaintiff was not entitled to recover for that reason. The Court further held that it was immaterial whether the payment actually reached any official of the Post Office Department in fact. The Court said (p. 242):—

"As regards the contractor, Price, the court is of the opinion that this act of his rendered the expedited service *contra bonos mores* and against public policy. **Whether the money went farther than the person who received it; whether it was divided with officials in the Post Office Department, the court does not inquire.** It is sufficient to know that the expedited service was not ordered in conformity with the petition of inhabitants along the post office routes until the money was promised, and that it was ordered immediately after that arrangement had been made, and that the money was paid so soon as the expedition was secured.

This court has always regarded the Government as somewhat in the character of a ward, and its officers in the character of its guardians, and it has never given effect to a contract where it appeared that the contractor had directly or indirectly, by direct bribes or corrupt influences, sought to impair the good faith of the guardian. The corrupt purchase of political or personal influence is more insidious, and in its result as bad as direct bribery. Whoever has business dealings with a trustee, a guardian, an executor, or officers of the Government can sway them by no influence which will be prejudicial to the interests of the cestui que trust."

The significant thing about the foregoing case is that there was no evidence how far the money went or that any person who was actually officially connected with the contract received any of the money. Again, the only way that Appellants' counsel can distinguish the case is by alleging that there are no facts in the record which indicate that the financial transaction between Fall and Doheny was intended to secure to Doheny's company an advantage from the Government. We have heretofore fully commented on the inferences to be drawn from the facts proved and those which the Trial Court did draw.

Atlantic Contracting Co. vs. United States (1922), 57 Ct. Cls. 185.

The plaintiff corporation brought suit against the United States to recover on a *quantum meruit* for work and materials furnished to the United States. In 1896 the plaintiff had made a contract with the United States through the agency of one Captain Carter, of the Army, to do certain work at Cumberland Sound. In 1897 Gaynor and Green, who owned substantially all the stock in the plaintiff corporation, were indicted along

with Captain Carter for conspiracy to defraud and embezzle from the United States, and work was suspended under the contract. Later these three were tried and convicted, it appearing that they had presented false claims against the United States to a large amount, which had been paid to the corporation through the agency of Carter and by virtue of the contract. The Court of Claims denied recovery, holding, first, that the contract itself was tainted with fraud through the conspiracy between the three persons, and that no recovery was therefore possible on the contract; second, that the corporation could not recover on a *quantum meruit*, especially since such a recovery would inure directly to the benefit of Gaynor and Green, who were parties to the fraud. The Court said (p. 196):—

“While the plaintiff seeks to recover upon a *quantum meruit*, yet it is apparent from the evidence that its alleged rights spring directly from the contract, which is illegal and fraudulent. No court will lend its assistance in any way to carry out the terms of an illegal contract, nor will the court enforce any alleged rights directly springing from such contract. *McMullen v. Hoffman*, 174 U. S. 639, 654. * * * **The court will not countenance the attempt made here in the name of the corporation to recover this money when it appears from the evidence that Gaynor and Green are in effect the owners of the corporation and will be the beneficiaries of any recovery which may be made.**”

What is said in the foregoing authority is particularly applicable to the position which Mr. Doheny holds and held in the Appellant companies. The distinction attempted between this case and the case at bar in Appellants' brief is merely a distinction in language, but none in principle.

Hume vs. United States (1889), 132 U. S. 406.

The plaintiff sued to recover an amount alleged to be due him under a contract to furnish shucks to a United States hospital at 60 cents per pound. It appeared in evidence that this was thirty-five times their highest market value, and the defence relied upon by the United States was the unconscionable nature of the contract. This Court sustained this defence and affirmed a verdict for the defendant arrived at in the court below, on the ground that the contract on its face was so extortionate as to raise a presumption of fraud. In reference to the effect of the allegation of fraud this Court said (p. 414):—

“ * * * In such cases the natural and irresistible inference of fraud is as efficacious to maintain the defence at law as to sustain an application for affirmative relief in equity.”

The above case is a valuable authority for the very reason that from the facts and circumstances this Court found that there was a presumption of fraud. This is exactly what the Trial Court has done in the instant case.

Various State cases illustrate the familiar doctrine that bribery or corruption in connection with any contract obtained from public authorities render such a contract voidable at the option of the public.

Seltzer vs. Metropolitan Elec. Co. (1901), 199 Pa. 100.

Suit was brought to rescind a contract made between the city of Reading and the defendant, the electric company, on the ground of fraud. The bill alleged a conspiracy among the councilmen to award the contract to the defendant at exorbitant rates and that certain sums of money were paid to three of them. The lower court sustained a demurrer to the bill on the ground that

the names of all those councilmen in the conspiracy were not set out and that the bill in other respects failed to charge the fraud sufficiently definitely. The Supreme Court reversed this order, saying in part (p. 106):—

“Public policy requires the closest scrutiny to be given the official acts of municipal authorities, and when they are procured by fraud the court should not hesitate to declare them void. While the pleadings charging official corruption should be specific and sufficiently certain to aver the fraudulent conduct and the parties charged therewith, yet the court should not be astute in detecting insufficiency and thus shielding the accused official from disclosing his official acts. If they tend to criminate him he can protect himself; and until he asserts his right to do so his accuser should be granted every facility to investigate his conduct.”

Herman vs. City of Oconto (1898), 100 Wis. 391.

The plaintiff sued the city for the balance due on a written contract for the construction of a sewer. The city pleaded that the contract was secured by the bribery of certain members of its board of public works through payment to some of them, whose names were to the defendant unknown, of certain sums of money. The plaintiff moved for judgment on the pleadings on the ground that the defendant's answer did not state facts sufficient to amount to a defence. The trial court granted this motion and on appeal the Supreme Court reversed the order, saying that the fraud, though alleged in very general terms, was sufficiently set out to constitute a defence. The court also held that (p. 399):

“The mere fact that the contract was let to the lowest bidder does not obviate the objection. Nor does the fact that the contract as made by

the board of public works was not binding until approved by the common council. The action of the board of public works was essential to the making of the contract."

See also **Weston vs. Syracuse (1899)**, 158 N. Y. 274, 286.

Washington Irrigation Co. vs. Krutz (1902), 119 Fed. 279, (C. C. A. 9th).

One Krutz, while Register of the United States Land Office at North Yakima, Washington, had to do with land transactions in which the Northern Pacific Railway Company was interested. The latter was represented by its western land agent, Schulze, who was also president of a canal company. During the course of the negotiations Schulze expressed to Krutz his gratification at the turn which matters had taken and offered to give Krutz 160 acres of land. Krutz rejected the offer, stating that since he was then Register he could not accept it. Krutz testified, however, that he told Schulze, "If he could give me any work for the company after my term of office expired, so that I could feel that I had earned the land, I would then accept it." After Krutz had severed his official connections he gave Schulze certain advice with reference to clearing up title to lands (which services, however, the court found to have been nominal), and Schulze then told him that he had entitled himself to a 160 acres.

The court finds that thereafter a new and distinct contract was made between Krutz and the canal company by which Krutz agreed to convey to the latter 160 acres of land in return for a water right for the benefit of other property which Krutz owned. The case was a suit for specific performance to compel the

conveyance of this water right, Krutz having performed his agreement to cause 160 acres of land to be conveyed to the canal company. The defence relied upon was the invalidity of the second contract.

The Circuit Court of Appeals carefully distinguished between the two agreements, finding that the first was wholly illegal and unenforceable because of the taint of bribery surrounding it, but that the second agreement was made between different parties and rested upon a new and valid consideration and had at most a very remote relationship to the first agreement. The Circuit Court of Appeals therefore affirmed the decree of the court below in favor of the plaintiff.

The importance of the case, however, for our purpose, lies in the consideration given by the court to the first contract by which Krutz became entitled to 160 acres for services alleged to have been performed for the railroad company after Krutz had severed connection with the United States service. The court discusses this agreement in the following language (p. 285):

"It must be admitted that, if Krutz had accepted the offer of Schulze while he was in office, the bribery of the one and corruption of the other could not be questioned. Such a contract would be *contra bonos mores*, and could not be enforced in a court of justice. But Krutz did not accept the offer. He refused it, accompanying the refusal with the statement that he could not accept it while he was in office, but that his term of office would soon expire, and if the railroad company would then give him something to do, so that he could feel that he had earned the 160 acres of land, he would then accept the offer. The services rendered by petitioner to the railroad company at the request of Schulze after he went out of office were, in our opinion, purely nominal, and were so blended with

the original offer made by Schulze, and conditional acceptance by Krutz, as to make it but one transaction; and if the case rested alone on such services, in connection with the manner of the original offer, it would unquestionably be the duty of a court of equity to put its seal of condemnation on the whole transaction, and dismiss a bill brought to enforce such a contract.

"As register of the land office, Krutz was, as he states in his testimony, frequently called upon to give advice to people as to the manner of selecting and locating public lands, etc. It was his duty to inform such parties of the methods and procedure to be pursued in such matters, but he had no right to go outside of his legitimate duties in this respect, and become the partisan adviser of one applicant, and point out to him a course to be pursued whereby he could obtain a preference over others, to their prejudice and detriment. The action of a public officer should always be guided and controlled only by considerations of the public welfare, and a desire faithfully, honestly, and impartially to perform his official duties; and any action taken by him outside of his official duties, which tends to substitute for those considerations others, which are based upon illegal grounds, is clearly opposed to public policy and void. This principle is too well settled to require the citation of any authorities.

"It is unnecessary to criticize the action of Mr. Krutz in regard to his conditional acceptance of the offer. He may have been actuated by good motives, without any intent to do wrong; and he may have thought that by the services he subsequently rendered he had justly earned the fee which entitled him to then accept a deed, as previously offered by Schulze. But it is impossible to separate the services from the original offer, so as to make the last valid if the first was void. The services rendered by Krutz after he went out of office are so blended with the original promise and conditional acceptance as to make the whole a unit and in-

divisible. That which is bad destroys that which is good, and they perish together.

"It is the duty of courts to carefully scrutinize contracts of this general character, and to condemn the very appearance of evil, as the tendency of such contracts is to lead to the encouragement of wrongdoing. Hence the relief asked for in such cases should not be granted. This result follows 'without reference to the question whether improper means are contemplated or used in their execution. **The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.'** Tool Co. v. Norris, 2 Wall. 45, 56, 17 L. Ed. 868; Trist v. Child, 21 Wall. 441, 452, 22 L. Ed. 623; Meguire v. Corwine, 101 U. S. 108, 111, 25 L. Ed. 899; Oscanyan v. Arms Co., 103 U. S. 261, 275, 26 L. Ed. 539."

Appellants in their brief fail to see the bearing of the Seltzer case. The very point they make here was made in that case, that there was no proof but that councilmen who had not been tampered with in sufficient number had voted affirmatively and that therefore the contract was not brought about by a fraudulent act, but the court would have none of this argument.

We cannot understand Appellants' attempted distinction of the Herman case. A reading of that case will disclose that the very defenses were attempted there which Appellants have attempted here. It was argued that no damage had been done to the city because the contract was in fact let to the lowest bidder. The court held that this was beside the point. It was further argued, just as Appellants argue here, that the action of the members of the Board of Public Works was immaterial because the contract was not binding until approved by another body, the common council. Here the Appellants argue Fall's actions were immaterial

because the contract could not have been lawfully made unless Denby had signed it. The courts below would have none of this argument.

Nothing said by Appellants in their brief concerning the Krutz case serves in any manner to avoid the unequivocal language of the court touching such dealings as there were in that case and as there are in the case at bar.

5. The statements of Edward L. Doheny made before the Senate Committee on Public Lands were properly admitted in evidence.

(Point XII (3), Appellants' brief, p. 294.)

After E. L. Doheny, Jr., and E. L. Doheny, Sr., had claimed their constitutional privilege against giving evidence that would incriminate themselves (R. I-185-188), the Appellee introduced in evidence certain statements made by E. L. Doheny, Sr., before the Senate Committee on Public Lands. In considering the admissibility of this testimony it is necessary to have in mind the circumstances under which the statements were made.

In January and February of 1924, E. L. Doheny, Sr., voluntarily appeared before the Senate Committee on Public Lands and made the statements which were introduced in evidence. At that time, namely, January and February of 1924, the appellant corporations were operating under the terms of the documents here sought to be cancelled. They had various dealings at that time with the United States in connection with them, and the United States in turn was supervising and checking up upon the operations of the appellant corporations.

Under its contract with the Government the Transport Company was constructing tanks at Pearl Harbor

and preparing to, or had filled them with oil. The construction as it progressed had been supervised by the Government. The work had to be approved by Government inspectors.

In California the Petroleum Company had transactions with the Government relating to the payment of royalty and the gauging and accounting for oil taken from the leased property, as well as general questions pertaining to the conduct of the lessee under the lease. Both corporations had expended large sums of money under their agreements with the Government.

In the fall of 1923, in view of charges that were current, the Senate authorized one of its Committees to make an investigation into the granting of the leases and the making of the agreements with the appellant corporations. This is a matter of common knowledge, and it is also the subject of various public resolutions of which this Court will take judicial notice.

As a result of that investigation Congress might conceivably direct the legal officers of the Government to take appropriate action to cancel and declare void the agreements under which the appellant corporations were acting. It was to the interest of Appellants to satisfy Congress that there was no necessity for such suit, and thereby to render secure the large expenditures which they had theretofore made. In particular, in the accomplishment of this purpose, it was to the interest of Appellants to have the \$100,000. "loan" of Doheny to Fall treated as a private personal transaction, having no relation whatsoever to the making of the leases and agreements here in suit. Statements and representations that this loan was a personal matter were within the corporate purposes and were for the advantage of the corporations.

There was no one so competent to represent the

appellant corporations in such a matter as was Doheny. The latter, as president of both Appellants, had negotiated the agreements which were being attacked. He was thoroughly familiar with all of the facts pertaining to them. He was in fact in January and February, 1924, still an important executive officer of both the Appellants.

A glance at the Record, pages 50 and 65, will show that on the same day he signed the contract of December 11, 1922, as president of Transport Company, and the lease of the same date as Chairman of the Board of Petroleum Company. The Record, page 84, shows he became Chairman in July, 1922, and thereafter, as before, he continued to act as the person who could speak with authority and deal for both companies, without the slightest question being raised as to his authority. The Record is full of evidence as to this. The companies always ratified and acted upon what he did in their behalf. By virtue of his stock ownership and of his family relations he was the dominating and controlling figure at that time, as well as earlier, in the policy of both of them.

Because of his control and because of his activity in moulding the policies of the corporations, the public might well consider that he was, in effect, the Pan American Companies. The Committee before whom he appeared might well also have this understanding.

These facts, upon which Mr. Doheny's authority to speak for the appellant corporations is based, appear *aliunde* any statements of Mr. Doheny about his authority. If, however, we look at his statement before the Committee, the fundamental purpose appears to be to insist that the \$100,000. "loan" was a private and personal transaction of his with Mr. Fall, and that it did not enter into and poison the agreements which his

corporations had with the Government. His companies, of course, as well as he, wanted to divorce the two so that the investment and expenditures made by the appellant corporations under the leases and agreements should not be lost to him and the other stockholders.

Under these circumstances E. L. Doheny, Sr., voluntarily came before the Senate Committee on Public Lands and made certain statements in connection with which he coupled a formal offer that if a board of experts should report that the contracts with the Government were not advantageous to the Government, he on his part would cause the board of directors of the Transport Company to reconvey all interests in such contracts to the Government (R. I-206-207). This shows his own appraisal of his powerful position with his companies.

The District Court received Mr. Doheny's statements before the Senate Committee as being admissions by an officer of a corporation acting for it and within the scope of his authority. This clearly appears from the opinion of the District Court (R. I-191), wherein it is stated:—

“It seems to me the question is whether, at the time it is claimed these declarations were made, the declarant was acting within the scope of his authority as an agent of the defendant corporation.”

The discussion in Appellants' brief about “*res gestae*” is quite beside the point.

The Circuit Court of Appeals likewise held the admissions of Mr. Doheny to be admissible because he was an officer of the appellant corporations acting for them and within the scope of his authority (R. III-1499-1501). Cases supporting this proposition are:—

Xenia Bank vs. Stewart (1884), 114 U. S. 224.

Fidelity & Deposit Co. vs. Courtney (1902), 186 U. S. 342, at p. 351.

Chicago vs. Greer (1869), 76 U. S. (9 Wall.) 726.

- Aetna Indemnity Co. vs. Auto-Traction Co.** (1906),
147 Fed. 95 (C. C. A. 9).
Joslyn vs. Cadillac Automobile Co. (1910), 177
Fed. 863 (C. C. A. 6).
Rosenberger vs. Wilcox Motor Co. (1920), 145
Minn. 408.
Kirkstall Brewery Co. vs. Furness Railway Co.
(1874), L. R. 9 Q. B. 468.
Chicago, Burlington and Quincy R. R. Co. vs.
Coleman (1857), 18 Ill. 297, 298.
2 Wigmore on Evidence, Sec. 1048.

Most of these authorities are cited by the Circuit Court of Appeals in its opinion supporting the admissibility of this evidence.

The cases cited by Appellants in their brief as contrary are readily distinguishable. The fact situations in those cases differ from the facts in this case upon one or more of three broad general lines of distinction.

In some of the cases cited by Appellants the testimony would not have been admissible if given by the declarant in court subject to cross examination, because the declarant was without competent knowledge of the facts whereof he spoke, or because his declarations were irrelevant and immaterial. This is true of *Goetz vs. Bank of Kansas City* (1886), 119 U. S. 551, and of *Winchester, etc., vs. Creary* (1885), 116 U. S. 161, as well as of many of the other cases cited by Appellants.

A second broad ground of distinction running through the cases cited by Appellants is that the declarant had no authority, either express or apparent, to transact business for the corporation. Characteristic cases of this kind are *Vicksburg & Meridian R. R. Co. vs. O'Brien* (1886), 119 U. S. 99, and *Northwestern Union Packet Co. vs. Clough* (1874), 87 U. S. 528. Obviously neither the engineer in the O'Brien case, nor the master of the vessel in the Clough case, had authority to settle controversies in which their corporations were involved.

A third broad line of distinction in the cases cited by Appellants is that in many of them there was no pretense on the part of the declarant that his actions or words were on behalf of his corporation. The *Goetz case*, mentioned above, would seem also to fall within this category. So also do the cases cited by Appellants on page 296 of their brief in their "witness" section. It will be found that all of the cases cited by Appellants are distinguishable on their facts upon one or more of the three grounds given above.

The Circuit Court of Appeals suggested that the statements of Mr. Doheny before the Senate Committee were likewise properly admitted in evidence as being declarations against interest. It appears from the record (R. I-259-260; 263-265) that Mr. Doheny intentionally tore the signature from the note in order that it would not be a valid subsisting obligation. The testimony further shows (R. I-244-245; 247-249) that it was Mr. Doheny's understanding of the transaction that the note, although on its face a demand note, was not to be paid on demand. On the contrary, Mr. Fall was not to pay the note until he was ready and able to do so. The pecuniary and proprietary detriment to Mr. Doheny personally resulting from these statements is obvious. It is likewise clear that Mr. Doheny, by claiming his constitutional privilege, made himself as unmistakably unavailable as a witness as though he were dead. Under these circumstances the authorities hold that Mr. Doheny's statements were properly received in evidence as declarations against interest:

Weber vs. C. R. I. & P. R. R. Co. (1916), 175 Iowa, 358, 384.

Harriman vs. Brown (1837), 8 Leigh (Va.), 697, 713.

Griffith vs. Sauls (1890), 77 Tex. 630.

3 Wigmore on Evidence, Sec. 1456.

4 Chamberlayne on Evidence, Sec. 2771.

On both the grounds taken by the Circuit Court of Appeals we submit that the statements of Mr. Doheny to the Senate Committee were properly admitted in evidence.

We wish to point out in this connection, however, that the statements of Mr. Doheny made before the Senate Committee are not the only testimony upon which the finding of fact with regard to the \$100,000 transaction rests. From the testimony of the witnesses Youngs and Little (R. I-166-171) it appears that \$100,000 was drawn from the account of young Doheny (an officer of the defendant corporations) on November 29, 1921; that it was drawn in cash in large bills; and that this amount was within a short time reimbursed to young Doheny by his father, E. L. Doheny, Sr. From the testimony of the witnesses Hill and Mack (R. I-171-174) it appears that under date of November 30, 1921, a demand note for \$100,000 was written out by Secretary Fall and was in the custody of Doheny, Sr., on February 1, 1924, when it was produced by him before the Senate Committee on Public Lands. From the testimony of the witnesses Benton, Harris and Flory (R. I-174-179) it appears that beginning December 5, 1921, and during the days immediately following, Fall contracted to purchase a ranch property for between \$90,000 and \$100,000, and that in making payment for this property, directly or indirectly, he produced and used \$98,700 in bills of large denominations.

There is also the testimony of Mrs. E. L. Doheny, to be subsequently noted.

The foregoing testimony, irrespective of Doheny's statements, would be sufficient, in the absence of explanation by either Fall or Doheny, to justify the findings as to the financial dealings between Fall and Doheny on or about November 30, 1921.

6. The Trial Court properly admitted the evidence of Mrs. Edward L. Doheny.

(Point XIII (3), Appellants' brief, p. 294.)

All of the testimony given by this witness and appearing in Vol. I of the Record on pages 181 and 182, down to the matter in quotation marks seven lines from the bottom of page 182, is obviously relevant and competent testimony. It will be borne in mind that any supposed privilege Mrs. Doheny had was expressly waived. It will be noted that her testimony down to the point indicated was solely as to facts and not as to communications by her husband to her. It was solely with regard to the physical whereabouts of a certain paper and where she had seen it, etc. That paper had already been identified as a promissory note in the usual form and in Fall's handwriting, but with the signature torn therefrom. Testimony as to facts regarding that paper, the time of the tearing of the signature therefrom, etc., was obviously relevant and competent and was obviously, in view of the stipulation made when the witness was called, admissible so far as any question of privilege was concerned.

If it be claimed that the conversation detailed by Mrs. Doheny on the last seven lines of page 182 and the first four lines of page 183 was irrelevant as hearsay, the worst that can be said of it is that the admission of it was immaterial and was not harmful error for the reason that all this matter was covered by the admissions of Mr. Doheny before the Senate Committee, which were afterwards admitted in evidence. Furthermore, counsel for Appellants evidently placed no stress on their objection, for they themselves examined Mrs. Doheny as to said conversations and brought out a number of matters in the nature of communications to her by Mr. Doheny in her cross examination. See pages 183 to 185 of the Record.

Moreover, if the ground of the objection was the hearsay character of the statements, on which ground counsel now object, we submit that this specific objection should have been made at the time. It was not, but counsel relied merely on their initial objection to all the testimony of the witness. We submit that, in view of these facts they have no standing now to object on the ground of hearsay evidence.

7. The Trial Court properly admitted evidence of communications between applicants for leases and various Government officials during the period covered by the negotiation and execution of the contracts and leases in question.

(Point XIV, Appellants' brief, p. 305.)

Unless the whole theory on which the case was tried and decided was wrong, the matter of the motive and intent of the Government departments concerned with the leasing of Naval Reserve No. 1, which motive and intent was known by Doheny, was highly important in determining the good or bad faith of Fall and Doheny and how it was evidenced in what was done. A most pertinent inquiry would be, were the purposes and intentions with regard to these contracts and leases made known, were they open and above board, or was there secrecy and suppression of fact practiced in connection with this matter.

We have above, pages 75-89 of this brief, treated in full of the secrecy enjoined and observed with regard to these matters. We shall not here repeat the argument. The whole burden of the defence in this case is the utter good faith of the Government officials concerned. One of the arguments is that the secrecy was maintained because of military reasons. We have above, pages 87-89 of this brief, shown the futility of this

contention. Another argument is that these letters, when written, were not misrepresentations or suppressions because they represented when written the true situation, since the Government did not have any intent at the time the letters were written to make any further leases in the reserves. Of course this argument, if sound, lends no support for the exclusion of the letters, for, if sound, then the admission of the letters helps the Appellants and does not harm them.

The matter, however, goes somewhat deeper than this, and the letters cannot be disposed of in this cavalier manner. There is sufficient evidence in this case to convince that secrecy was enjoined by Fall on all the parties concerned in these transactions, and that for whatever reason the secrecy was imposed the employees of the department understood that it was the policy and sought to comply with that policy. (Pages 78-82 of this brief.)

Having shown that Fall enjoined secrecy on his subordinate officials and the Government officers associated with him, and that this was part of the conspiracy, it became relevant and material to show that this policy of secrecy was actually effective in the consummation of the conspiracy. The letters written by applicants for leases show that they were desirous of obtaining them. They were put off from time to time, and did not have and were not given information respecting the exact situation with regard to the reserves. The replies of the Government officials show the continuance of the purpose and design of secrecy and its effective operation up to the time that the conspiracy as planned was fully consummated. This correspondence shows the effectiveness with which Fall was able to impose his will upon and control his subordinates and associates to make them innocent instruments in carrying out his designs.

8. Pecuniary damage to the United States was shown by Appellee; but in the absence of any such showing the decree against the Appellants was justified and required.

(*Point XV, Appellants' brief, p. 307.*)

Appellants contend that in this case the burden lies upon Appellee not only to prove fraud, but also to prove that that fraud actually pecuniarily injured the United States. If this be the law, it is our contention that the Appellee has shown that it suffered serious pecuniary damage. It is to be borne in mind that the United States is here seeking to rescind *inter alia* the leases of June 5 and December 11, 1922, whereby the Appellants fraudulently and contrary to law acquired possession of certain public lands of the United States.

It is admitted that the leased public lands are and were at the time known to be valuable oil lands. It is further admitted that the Appellants have entered into possession of the said lands and have extracted therefrom large quantities of oil, gas and other petroleum products. This waste not only runs into several millions of dollars, but also has impaired the value of the leased lands by reason of the mineral extracted therefrom. There can be no doubt but that the United States has therefore suffered pecuniary damage in the instant case.

The argument for the Appellants entirely overlooks the fact that the United States has suffered pecuniary losses by reason of the aforesaid deprivation of its right to possession and by reason of the extraction of minerals to which it has lawful title. They mean by pecuniary damage that the United States must show that the contracts and leases were not good contracts and leases, in a commercial sense; that is to say, that better contracts and leases could and ought to have been obtained by the United States. They say that if an

officer of the United States, be his motive good or bad, transcends the law, makes a contract by law forbidden, and under it property of the United States is bartered away, the Government is helpless to redress the wrong unless it proves pecuniary damage. The implications of this doctrine are, indeed, startling.

Such an argument is not sound and is not supported by the authorities. There is an unbroken line of decisions to the effect that in a suit brought by the United States to recover possession of public land of which it has been fraudulently or unlawfully deprived by lease or otherwise, a cause of action is stated and proved by showing that the lands in question were a part of the public domain, that the United States was fraudulently or illegally deprived of its title thereto, or of its right to the immediate possession and usufruct thereof, and that the United States now seeks to regain its title or right of possession of said public lands. No burden therefore rests upon the United States to establish as a condition precedent to its right to relief that the contracts and leases are not commercially good ones and that better ones might have been obtained.

A particular province of a court of equity is the redressing of wrongs resulting from the breach of a fiduciary relationship. Such a breach of duty is the acceptance by an agent of improper inducements designed to tempt him to violate his duty to his principal. When that situation exists, as it does in the present case, a court of equity will grant relief without requiring the injured principal to prove that the contracts which his agent made for him were not good ones, or that better ones might have been obtained. Because of its baneful tendency, equity is eager to do all it can to redress this kind of a fraud.

In *United States vs. Carter* (1909), 217 U. S. 286,

it was held that where a fraud of this kind had been committed against the United States, the fact that the United States had suffered no pecuniary damage did not prevent recovery. This suit was one for the recovery of the illicit profit made by the agent, but the language cited with approval by this Court in the Carter case, is, we submit, also conclusive upon our present point.

In that case, discussing the obligations of an officer of the Government, Mr. Justice Lurton said (p. 306):—

“‘Thus, in *Aberdeen Railroad Company v. Blaikie Brothers*, 1 MacQueen’s Appeal Cases, 461, 472, it was applied to a contract of a director dealing in behalf of his company. Lord Chancellor Cranworth, in respect to the general rule, said:

“‘And it is a rule of universal application, that no one having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict with the interest of those he is bound to protect.

“‘So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.

“‘It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the *cestui que trust*, which it was possible to obtain.

“‘It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person—they may even at the time have been better.

“‘But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this head are numerous and uniform.’”

City of Findlay vs. Pertz (1895), 66 Fed. 427, (CCA, 6).

Here the firm of Pertz and Stewart, who had for some time employed one "B" as a selling agent, sued the City of Findlay on a contract for certain gas separators furnished to the city. "B," during the time of his agency, had been appointed Superintendent of the city gas plant, and as such had negotiated the purchase of the separators and had received commissions from the sellers, without disclosing same to the city. There was evidence that the city continued to use these machines after it had discovered "B's" dual relationship; that the machines were patented and were never sold except for one price, and that the plaintiffs (the sellers) "had not induced or procured 'B' to influence this particular sale." The city attempted to defend on the ground of "B's" improper relationship to both parties, but the lower court withdrew this defense from the consideration of the jury and a verdict was rendered in favor of the sellers. The Circuit Court of Appeals reversed the judgment holding that there was sufficient evidence of fraud to go to the jury, and, furthermore, if in fact "B" had received the commissions as above stated this *per se* vitiated the contract between the sellers and the city, regardless of whether it was a fair and equitable contract or not. The court states in part (p. 437):

"* * * Upon this discovery of this improper inducement operating upon its agent, the city had a right to repudiate the purchase and return the property bought. **This right it might exercise without regard to any actual injury it had sustained, and without regard to the effect of the allowance of the commission upon the integrity of its agent.** *Harrington v. Dock Co.*, cited above, and *Lister v. Stubbs*, 45 Ch. Div. 1."

The Court cites **Michoud vs. Girod** (1846), 4 How. 502, and **Robertson vs. Chapman** (1893), 152 U. S. 673, which both hold that a secret profit derived by an agent may be recovered back by his principal without any showing of injury to the principal.

Commonwealth S. S. Co. vs. American Ship Building Company (1912), 197 Fed. 780.

The plaintiff steamship company sued to rescind the contracts made with the defendant on the ground that the defendant paid a secret commission to the promoters of the plaintiff corporation, the latter having organized the plaintiff and assigned to it the contract to build a steamship at a stated price. Upon demurrer to the bill the court held that the promoters were acting in a trust capacity, and that the secret commission amounted to a bribe which vitiated the contract, regardless of whether the contract was fair or otherwise. The demurrer was, therefore, overruled. The court quotes with approval from the language of *Alger v. Anderson*, 78 Fed. 729, where the court states that the principal who asks relief on account of an alleged fraudulent payment made to his agent is not under the burden of showing that such an alleged bribe had any influence upon the agent. " * * * it is not necessary as a basis for relief for such principal to show the actual effect of the bribe or gift upon the agent." (P. 787.)

In the Commonwealth case the defendant contended that the bill was bad on its face for the reason that "It is plainly apparent on the face of the bills that had the representation and fraud complained of not occurred the conduct of the parties would have been the same; that the fraud complained of did not in any way affect the substance of the contract and the thing desired and contracted for by the complainant was in all respects according to the terms of the contract."

The court overruled this contention, holding the point to be immaterial and quoting with approval from 34 O. S. 460:

“ * * * in all cases where, without the assent of the principal, the agent has assumed to act in such double capacity, the principal may avoid the transaction, at his election. No question of its fairness or unfairness can be raised. The law holds it constructively fraudulent and voidable at the election of the principal.” (P. 790.)

The court then goes on to state that it “will not stop to inquire whether the contract was fair or otherwise, but will set aside the entire transaction as fraudulent and inequitable. * * * Fraud should be prevented by being made as far as possible impossible of perpetration, and the party who enters into a fraudulent transaction should do so at his peril. **It is no duty of a court to weigh the equities of joint tort feorsors or of bribe givers and bribe takers.**” (P. 791.)

The peculiar position which the Government occupies in suits to recover public lands illegally or fraudulently obtained from it is recognized by courts of equity. The Government is the custodian of public lands for the benefit of all of the people and it owes a duty to the public to see that the lands belonging to all are not obtained by individuals in violation of the statutes enacted for the purpose, nor in violation of the rules of honest dealing with Government officials.

The books are full of cases where the United States has brought suit to cancel patents granted illegally or fraudulently.

Causey vs. United States (1916), 240 U. S. 399.
United States vs. Trinidad Coal Co. (1890), 137
U. S. 160.

Diamond C. & C. Co. vs. Payne (1921), 271 Fed. 362.
United States vs. Poland (1920), 251 U. S. 221.
Heckman vs. United States (1911), 224 U. S. 413.

No suggestion is found in any of them that the United States must show a pecuniary damage to it by the issuance of the patent. In addition we submit the following list of cases in all of which relief was granted where title to lands had been fraudulently obtained from the United States, and in none of which was a word said on the subject of pecuniary loss or damage to the United States. In all of them, as here, the United States was seeking to have its title restored to it.

Curtis Co. vs. United States (1922), 262 U. S. 215.
United States vs. So. Pac. Co. (1919), 251 U. S. 1.
Wright Blodgett Co. vs. United States (1914), 236 U. S. 397.
Wash. Sec. Co. vs. United States (1913), 234 U. S. 76.
Diamond Coal Co. vs. United States (1913), 233 U. S. 236.
United States vs. Kettenbach (1913), 208 Fed. 209 (9th C. C. A.).

The Appellants, at page 312 of their brief, seek to distinguish these cases upon the alleged ground that they were actions brought not upon the general theory of fraud remedial in equity, but to redress the violations of provisions of specific statutes. We are entirely at a loss to see any force in this distinction. The present case is distinctly one in which, as held by the Circuit Court of Appeals, the lands were obtained by Appellants in violation of the provisions of specific statutes. Moreover, in the "land patent" cases, which we have cited, the lands were obtained by fraud, as were the lands in the present case. The Government was occupying precisely the same position as a litigant in those as it

occupies in the present case, and no ground or basis for the contrary assertion by Appellants at the top of page 313 of their brief can be perceived.

In the *Heckman* case, which was a suit by the United States to cancel certain conveyances of allotted Indian lands made not by the United States, but by members of the Cherokee Nation, the bill alleged that the conveyances were in violation of United States statutes touching the conveyance of Indian lands. A demurrer was filed on the ground that the bill was wholly without equity. The demurrer was sustained by the District Court, overruled by the Circuit Court, and this Court affirmed, using this language:

"Whether these restrictions upon the alienation of the allotted lands had been violated and the alleged conveyances were void, was a justiciable question; and in order that it might properly discharge its duty, and that it might obtain adequate relief, suited to the nature of the case in accordance with the principles of equity, the United States was entitled to invoke the equity jurisdiction of its courts. **It was not essential that it should have a pecuniary interest in the controversy.**" (Bottom 438.)

On page 439 the Court refers to *U. S. v. San Jacinto Tin Company*, and referring to the very language quoted by counsel for Appellants in this case, quotes with approval its own language in *U. S. v. American Bell Telephone Company*, as follows:

"* * * This language is construed by counsel for the appellee in this case to limit the relief granted at the instance of the United States to cases in which it has a direct pecuniary interest. But it is not susceptible of such construction. It was evidently in the mind of the court that the case before it was one where the property right to the land in controversy was the matter of importance, but it was

careful to say that the cases in which the instrumentality of the court can not thus be used are those where the United States has no pecuniary interest in the remedy sought, **and is also under no obligation to the party who will be benefited to sustain an action for his use, and also where it does not appear that any obligation existed on the part of the United States to the public or to any individual.'"**

The Appellants attempt to distinguish the *Heckman* case on the ground that the United States was suing there as guardian of an Indian tribe. This is not the fact. The Government was suing on behalf of numerous Indian allottees of public lands. The defendants had acquired these lands in violation of the statutes which prevent Indian allottees of public lands from alienating their lands within the period of twenty-one years after the allotment. It was not alleged that the Indians themselves had suffered any pecuniary loss or damage, other than having lost their lands in violation of the statutory restrictions. So far as appears from the case, they had received full and adequate consideration for them. Therefore, whether the United States was suing in its own right or in the right of the Indians, the case is definitely an authority for the proposition that a violation of the public statutes is in itself ground for cancellation and rescission in equity.

In the case of

Hammerschmidt vs. United States (1924), 265 U. S. 182.

this Court was called upon to define the crime of defrauding the United States. It did so at page 188 in the following words:—

“To conspire to defraud the United States means primarily to cheat the Government out of property

or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the over-reaching of those charged with carrying out the governmental intention."

This case cannot be distinguished by asserting that it was a criminal prosecution. The statute merely makes it criminal to defraud the United States, and the Court in this case defines what was meant by defrauding the United States.

The foregoing authorities fully establish the proposition that the United States need not prove pecuniary damage in a suit brought to recover title or possession of public lands of which it has been deprived by fraud or in violation of law.

It is, of course, not necessary for the Appellee in the present case to rely upon the proposition that no injury was done the United States by these contracts. It stands admitted that the lands in question were, at the time of the execution of the contracts and leases, estimated to contain many millions of barrels of oil. (R. II-864; III-1034). Mr. Doheny acknowledged that he expected to make a profit of at least \$100,000,000 out of the leases. Petroleum products of great value have already been extracted and removed from the leased lands. Under such a state of facts can there be any doubt but that the United States had, at the time of suit, actually suffered pecuniary damage of a serious amount? In addition, a court will always presume injury where favoritism was shown to the contracting party by Government officials, and will more readily do

so where, as here, there is an admission of an enormous profit to be made out of a contract granted by private negotiation to a favored party and where, also, performance under the contract shows that the expected profits will, in all probability, be realized.

The Appellants cite two cases, *Smith vs. Bolles* (1889), 132 U. S. 125, and *Sigafus vs. Porter* (1900), 179 U. S. 116, which they assert establish the proposition that parting with property, given for full value, on the faith of false representations, does not constitute damage. These cases were controversies between private litigants, and moreover they were actions at law and not suits in equity. They assert the obvious proposition that a money verdict cannot be recovered unless the plaintiff has a loss for which he is to be made whole. They discuss and decide the question that the damages at law in an action for deceit should not be measured by the difference in value between what the plaintiff parted with and what the defendant's representations induced him to believe he would get.

The cases cited by Appellants on page 309 of their brief are not in point. *Ming vs. Woolfolk* (1886), 116 U. S. 599, and *Stratton's Independence vs. Dines* (1905), 135 Fed. 449 (C. C. A. 8), are actions at law and not suits in equity. All of the cases on that page are suits between private parties and in none of them was the Government a party. Moreover, none of them involved a breach of fiduciary duty.

In *Garrow vs. Davis* (1853), 15 Howard, 272, cited by Appellants at page 310 of their brief, it appears that the plaintiffs no longer had any legal rights of any kind under their lapsed contract for the purchase of land. They thought that perhaps the vendor entertained a certain amount of good will toward them and so alleged, but the evidence proved that such was not in fact the

case. The Court held, therefore, that the plaintiffs never had anything of which they could be defrauded. They had parted with nothing whatsoever. Moreover, the Court found as a fact that their agent had not acted in bad faith. The case therefore is no authority in favor of Appellants' position.

Hyde vs. Shine (1905), 199 U. S. 62, is cited at page 310 of Appellants' brief. This was a case in which an indictment was found against a defendant charging a criminal conspiracy to defraud the United States out of public lands. A warrant of removal was issued and thereupon the defendant took a writ of *habeas corpus* to resist his removal to the place of trial, alleging that the indictment set forth no actual monetary loss or damage to the United States and therefore the indictment was bad and he should not be removed. The short answer to this of course was that a conspiracy to defraud the United States required no averment or proof of monetary damages.

Purely by way of dictum and in passing, in its opinion this Court said what is quoted on page 310 of Appellants' brief. It is to be noted, however, that the Court did not suggest what the rule in equity was. Nowhere in the case can any further statement with regard to the rule in equity be found than the one quoted by Appellants in their brief. Of course it constitutes no statement of what the rule is in equity, but a mere statement that the Court does not have to consider what the rule is in equity.

Counsel for Appellants, probably realizing that their cases heretofore mentioned are beside the point, aver that there are two "important cases in which the matter arose in actions like the present, *i. e.*, suits of equity to cancel instruments pursuant to an alleged conspiracy." We say without fear of contradiction that the actions were in no sense like the present.

United States vs. San Jacinto Tin Company (1888), 125 U. S. 273, cited on page 311 of Appellants' brief, is in fact an authority in favor of Appellee. The case is a complicated one, but the first four paragraphs of the syllabus make it entirely clear that it is full authority for the bringing of the present suit. The bill was dismissed in that case solely and only because the Court held that the fraud alleged in the bill had not been proved in fact. The case is authority on its facts for the proposition merely that when the United States brings a bill to set aside a title solely on the ground that it was obtained by fraud, and the fraud is not proved, the United States can not succeed.

The other question, namely, of the interest of the United States as plaintiff, was a collateral question, and this Court refused to dismiss on the allegation that the United States had no interest in the land in controversy. The suit was brought to annul a patent to lands upon the ground of a fraudulent survey whereby valuable mineral land had been included in the patented territory.

It was alleged by the defendant that the proofs in the case showed that the United States had no interest in the matter because if it should succeed in cancelling the patent of the defendant the land would immediately pass to another private claimant and not return into the ownership and possession of the United States. A claimant to the land who, it was alleged, would get the land if the United States recovered it, had in fact given a bond to the United States to indemnify it for the cost and expense of the proceeding. There was therefore some color to the position of the defendant that the United States was not in good faith prosecuting the action to get back its own land, but was acting as a cat's paw for another private claimant.

Nevertheless the Court held that it would not dis-

miss the bill on this ground because it was not stated that the United States was not attempting to get back the land **for itself**.

The quotation on page 311 of Appellants' brief is quite misleading. It appears to stop with the end of a sentence and the end of a thought. It does not, however, do so in the original report. It stops with a semicolon in the first line of page 286 of the report, and the Court then proceeds:

"and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; **in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own,** it can no more sustain such an action than any private person could under similar circumstances.

"In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist as the foundation of the right of action. **Of course this interest must be made to appear in the progress of the proceedings, either by pleading or evidence, and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail.** In the case before us the bill itself leaves a fair implication that if this patent is set aside the title to the property will revert to the United States, **together with the beneficial interest in it.** It is argued in the brief that this is not true; that in fact the government is but the instrument of one Baker, who married the widow of Abel Stearns; and that Stearns contested the correctness of this survey with others before the land department

very actively and energetically, because he had such an interest in the land covered by it that if it was defeated he would become the equitable or beneficial owner of the land. This view is supported by some pretty strong testimony and by the fact that Baker was the man at whose instance the action was begun.

"When the Attorney General required that a bond should be given to save the United States harmless with regard to the costs of these proceedings, Baker was the man who furnished the security and signed the bond himself. The condition inserted in that obligation recited 'that whereas the Attorney General of the United States of America has this day filed, at the request of the above-named R. S. Baker, a bill in equity in the name of and on behalf of the United States of America against the San Jacinto Tin Company: * * * Now, therefore, if the said Baker shall well and truly save the United States of America harmless from all costs and expenses which may be incurred by or against them in the prosecution of said suit to its final determination, and pay or cause to be paid on demand all such costs and expenses as may necessarily be incurred in such prosecution, then this obligation to be void.' Taking all these circumstances together, it raises a very strong implication that Baker expected that if the patent was set aside his right to the land covered by it, or to a large part of it, would become paramount.

"But we are not so entirely satisfied of the want of interest of the United States in the whole or a part of the land which is covered by this patent as to justify us in saying that the bill in the present case ought to be dismissed on that ground."

From the above case it is quite clear that if the United States claims that it has lost title or the right of possession to a piece of land through an instrument obtained

by fraud, the fact that the United States desires to repossess itself of its land is all the interest that is required to maintain its suit.

In *United States vs. Conklin* (1910), 177 Fed. Rep. 55, (C. C. A. 9) cited on page 311 of Appellants' brief, it appeared that the defendant by fraud had procured certain California forest lands and exchanged them for a United States patent to other public lands. The fraud which he had committed was in the acquirement of the forest lands from the previous owner of them. There was no fraud in the exchange of these lands with the United States, and the United States was content to retain the exchanged lands. The bill was for the cancellation of the patent to the lieu lands which had been patented to this fraudulent party when he turned over the forest lands to the United States.

There was no thought that the United States would give up these forest lands or take the patented lands back in lieu of them and return them to anybody. The United States brought the suit to get back the patented lands on behalf of whoever might be entitled to them in view of the fraud that had been practised in taking from them their original forest lands. It is quite evident from the case that the United States was not going to take back title to the patented lands and hold those lands for itself. It being an innocent party and having taken the forest lands, it had the consideration which it desired and intended to keep it.

A demurrer to the bill was sustained and a decree of dismissal entered for the obvious reason that the United States was not trying to retake in its own right lands which it alleged had been fraudulently obtained from it. It is unfortunate that counsel for the Appellants did not cite the language from this case which shows the very reason why it was decided. On page 59 Judge Hunt said:

"The object of the suit is not restitution to the government of property, or anything of pecuniary value, of which it has been wrongfully or fraudulently deprived; nor is its purpose to restore to the former owners any lands for which they have not been fully paid. What is really sought to be accomplished is the annulment of the patent and of the conveyance of the lands therein described to the defendant Walker, in order that the tract of 200 acres of the 'Monache Lands' may be returned to the original owners, or, as stated by the government's counsel, if the selection made in lieu of the Monache lands 'should stand on account of the fact that the United States acted without knowledge of the fraud practiced upon Mrs. Conklin and Mrs. Reddy, and without knowledge of the fraud that was being practiced upon it,' the patent, and conveyance of the patented land to Walker, should be set aside, 'in order that the appellant may confer these lands upon the persons entitled thereto by virtue of the selection, if such selection is in fact legal;' and that, 'if the selection should be allowed to stand, then the patent which was issued erroneously should be canceled, so that the proper transfer could be made by the federal government to Mrs. Conklin and Mrs. Reddy by a new patent.' In short, the main object and purpose of this suit is to clear the way for a return to Mrs. Conklin and Mrs. Reddy of the lands sold by them to Benson and for which they have been fully paid, or, if that can not be done, then to reinvest them, by the issuance of a new patent, with the title to the land once before patented to them, in exchange for the 200 acres of the Monache lands." (59-60.)

On page 60 the court lays down the principle on which we may rely, as follows:

"The government unquestionably may maintain an action for the annulment of its patents, and recover property of which it has been defrauded.

But, like any other party coming into a court asking for redress, it must, in its complaint, state facts *prima facie* sufficient to entitle it to the relief demanded; '* * * the respect due to a patent, the presumption that all the preceding steps required by law have been observed before its issue, the immense importance and necessity of the stability of titles depending upon these official instruments, demand that suits to set aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof.' *U. S. v. Stinson*, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724. If the title to the land involved in the suit was fairly acquired, it matters not what wrongs may have been done by the defendants in acquiring other lands. **The inquiry is confined to the question whether the lands described in the patent, whose validity is attacked, were fraudulently obtained from the government.** *U. S. v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384."

This case is therefore an authority in Appellee's favor. Like all of the other authorities cited by Appellants it fails signally to establish their contention. It is unthinkable that a court of equity should not be able to protect the public policy of the United States with respect to the disposition of its public lands and with respect to enforcing honest dealing by individuals with its public officers. The Appellants would have this Court say that though acts may be illegal, and though they may be criminal, nevertheless a court of equity will not move to protect the public interest. Surely this cannot be the law.

D. THE ILLEGALITY OF THE CONTRACTS AND LEASES.

1. Analysis of the contracts and leases.

(a) *The contract of April 25, 1922.*

The agreement is between Pan American Company, called the "Contractor," and the United States, by the Acting Secretary of the Interior and the Secretary of the Navy, called the "Government." (R. I-26.)

Article I makes the specifications and plans a part of the agreement and calls for a bond in \$250,000. (R. I-27.)

Article II states the intent to exchange crude oil, unsuitable for navy use, for fuel oil. (R. I-28.)

Article III is a covenant to furnish 1,500,000 barrels of fuel oil in storage to be constructed and erected by the contractor as per plans and specifications, for a lump sum of 5,878,905 barrels of crude oil from Naval Reserves 1 and 2, "of from 14 to 17.9 degrees (Baume) gravity or **crude oil in such other quantity and quality as shall be of equal value**, which lump sum shall be termed the **proposal sum**." The paragraph then proceeds as follows (R. I-29):—

"It is hereby mutually understood and agreed that said proposal sum is based upon the November-December, 1921, published field price of California crude oil of from 14 to 17.9 degrees (Baume) gravity (\$1.10 per barrel), which for the purposes of this agreement shall be termed the reference price of basic crude oil, and upon the November-December, 1921, market price of fuel oil at Bay Point, California (\$1.50 per barrel), which for the purposes of this agreement shall be termed the reference price of fuel oil."

It will be observed that the contractor does not agree in any and all events to take the 5,878,905 barrels of crude oil as his pay. He will only take that many barrels so far as this clause discloses at a certain gravity, and if that gravity is not delivered then the Government must deliver such other quantity and quality **"as shall be of equal value."** Value of the oil delivered, and, as appears just below in the same clause, **value in United States dollars**, is what the contractor demands for his performance. It is therefore perfectly plain that the so called "lump sum" of 5,878,905 barrels only means barrels of a certain quality, and that if the quality of the oil is higher and thus the oil is more valuable, the Government will need to deliver less barrels, whereas if the quality is lower and the oil therefore less valuable the Government will need to deliver more barrels.

How shall the Government know how many more barrels or how many less barrels it ought to deliver? The answer is found in the figure quoted in the same clause, viz.: \$1.10. It is agreed in this paragraph that a barrel of oil of 14 to 17.9 degrees gravity is valued at \$1.10. The amount the contractor is willing to take for his work and services is \$1.10 times 5,878,905, the number of barrels mentioned in the proposal sum. As a matter of fact this amounts to \$6,466,795.50. So Mr. Ambrose stated in his report of April 17, 1922 (Pl. Ex. 119; R. I-412). In order to compare the Pan American's bid with the other bids Ambrose found it necessary to reduce the number of barrels of oil to dollars by the simple expedient of multiplying by \$1.10. As we shall hereafter see, throughout the contract and its performance this has to be done. It is evident, therefore, that the so-called lump proposal sum in barrels is camouflage. What the parties are really talking

about is the "**value**" of the oil to be delivered by the Government in ease of its debt to the Pan American, and this value is measured in dollars and nothing else.

Again, it will be observed that the contractor agrees to deliver 1,500,000 barrels of fuel oil to the Government. It is of course uncertain just when the delivery will take place. This will depend upon how soon the storage facilities to receive the oil are finished. Here again comes in a new variant factor. Fuel oil may go up or go down. If fuel oil goes up the contractor, in order not to suffer a loss, will have to get a greater value of crude oil in payment. If on the other hand fuel oil goes down, the Government ought to pay less value for the fuel oil. The parties fixed in the language above quoted a so-called "reference price" of fuel oil of \$1.50. As we shall see in a moment, this means nothing, because the fuel oil is not to be delivered at that price. For the moment, however, we shall pass to the adjustments to be made depending upon the changes in price of crude oil. We shall thereafter take up the question of the changes in the so-called "reference price" of fuel oil.

In the next clause of Article III (R. I-29) it is provided that if on the day when the Government delivers any given number of barrels of 14 to 17.9 degrees gravity crude oil, "the published **field price**" of that kind of oil has changed "from the reference price" of said oil (that is, if the then current published field price of crude oil has gone up or gone down from \$1.10), "the Government shall be credited **on account of the proposal sum** with a number of barrels of 'basic crude oil' which bears to the actual number of barrels delivered the ratio which the **published field price on that date** bears to the reference price of basic crude oil."

Now this simply means: That as above stated, if

the actual value as fixed by the published field price of the crude oil which the Government delivers has gone up, then the so-called proposal sum is cut down. That is to say, this so-called lump sum of 5,878,905 barrels of oil is changed automatically and the so-called lump sum of barrels is decreased. On the other hand, if oil has gone down in value, then the Government will have to add to the proposal sum, in the ratio in which crude oil has fallen in price. In this event the proposal sum goes up in the number of barrels it contains. So it will be seen that the proposal sum, which is supposed to be a lump sum, may, and, as a practical matter has, changed from time to time, and it changes every few days as deliveries are made. It changes not only, as above shown, by reason of the difference in gravity of the oil delivered from that specified in the contract, but, as we now see, it also changes by reason of changes in market price.

The next clause in the contract (R. I-30) deals with a change in gravity and shows what we have just set forth, that the proposal sum vaults about from one figure to another with every change in the gravity of the crude oil delivered. We again call attention to the fact that it is not barrels of oil that the parties are discussing, but in essence it is the **market value** of the oil delivered. The parties intend that the Government shall deliver and the contractor receive enough royalty oil to make up the value in dollars of \$6,466,795.50, no matter what shifts in price or in quality there may be in the oil delivered.

In the next two clauses (R. I-30) the parties attempt to take up any differences there may be in the market price of fuel oil at the time of delivery. These paragraphs look very formidable in their wording. As a matter of fact they are extremely simple if we always

keep in mind that what the parties are trying to do is to deliver this \$6,466,795.50 worth of crude oil, **unless** the price of fuel oil has gone up, in which case they will deliver enough more to take up the rise in the price of fuel oil, or **unless** the price of fuel oil has gone down, in which case the contractor will not need as much as \$6,466,795.50 to reimburse him. \$1.10 bears a fixed ratio to \$1.00. If this had been a dollar contract the price of fuel oil, \$1.50 per barrel, would have been stated, and it would have been added that if the price went up or down the Government would pay the increase or decrease in market price at the time of delivery. But as has been made so clear by the witnesses, the parties did not dare to talk openly about dollars in this contract, so they had to translate an increase or decrease in the price of fuel oil into barrels of "basic" crude oil. Now one barrel of basic crude oil liquidates \$1.10 worth of indebtedness (see above for variants). Fuel oil goes up or down in dollars, and the scheme was therefore devised of adding to or subtracting from the proposal sum, so called, which was made up of barrels of \$1.10 crude oil, barrels of basic crude to take up increases or decreases in the price of fuel oil. This had to be done by working out the decimal or fraction which represents

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1.10, which would give the ratio of barrels to dollars. As a little additional camouflage, apparently, the parties

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translated this fraction into 100,000 to make the fraction mills (tenths of a cent) instead of dollars. It therefore becomes clear that the proposal sum has to vault about again for another reason, namely, increase or decrease in dollar value of the fuel oil delivered. What a precarious life the proposal sum lives when it has to change its nature from day to day by reason of all these

variant factors! All this has to be done to conceal "price" under the term "barrels." We shall show hereafter that the effort to conceal and avoid the words "price" and "value" was not very successful.

The last clause of Article III (R. I-31) provides for the payment of interest on credits and debits. Credits and debits are used only in expressions of indebtedness. Interest means debt, for people do not pay interest except they owe something. But of course the Government did not dare to spend money under this contract, so the interest had to be translated into barrels, and the clause provides that after calculating the interest it shall be added or subtracted from the proposal sum, depending upon which way the account stands, that is, in favor of the Government for oil delivered in advance of work, or in favor of the contractor for work delivered in advance of oil. Here again the proposal sum changes from time to time and is not really a lump sum at all, but simply a measure of value, really in dollars, but thinly veiled in barrels of oil.

Article IV (R. I-31) provides that the Government will continue to deliver oil "until **all claims** of the contractor under this contract **are satisfied.**" It may be pertinent in passing to ask how a claim can be satisfied by an "exchange" arrangement.

Article V (R. I-31) provides for granting by the Secretary of the Interior in his discretion of further leases if the amount of oil delivered annually runs below a certain fixed figure.

Article VI (R. I-32) provides for the delivery of accumulated royalty oil against the contract.

Article VII (R. I-32) provides that the contractor takes the crude oil at the well and bears the expense of any movement of it, and delivers the fuel oil in storage and pays for the transportation of it to storage.

Article VIII (R. I-32) provides for the gauging of the oil.

Article IX (R. I-33) provides for the payment of demurrage in case the Government delays the contractor's vessels at Pearl Harbor. The only interesting feature of this article is that demurrage is to be calculated in barrels of oil and added to the proposal sum. Here again that football, the proposal sum, is kicked about. If the Government incurs \$1.10 worth of obligation for demurrage one barrel of "basic crude" oil is added to the proposal sum.

Article X (R. I-33) deals with certain extra lengths and extra numbers of piles and with certain extras concerning dredging. These extras are all stated as so many barrels of basic crude oil for each unit of extra work. It also provides for deduction at the same rate in barrels of oil for decrease of work.

Article XI (R. I-34) confers the preferential right on the Pan American to receive any additional leases in a described portion of Reserve No. 1. This Article, as we shall hereafter show, transfers the administration of and all discretion concerning these lands to the Secretary of the Interior.

Article XII (R. I-35) provides for the giving of any saving in the construction of the storage facilities to the Government, such saving to be determined by agreement between the contractor and the Secretary of the Interior.

(b) *The lease of June 5, 1922.*

This lease was made by the Assistant Secretary of the Interior to the Petroleum Company, the subsidiary of the Transport Company, pursuant to the covering letter of April 25, 1922 (R. I-65), which was delivered at the same time the foregoing contract of April 25,

1922, was made. It followed necessarily, and formed a part of the transaction represented by the contract of April 25, 1922.

(c) *The contract of December 11, 1922.*

The parties are recited as the Transport Company, designated as the "Contractor," and the United States, acting by the Secretary of the Interior and the Secretary of the Navy, designated as the "Government" (R. I-41).

The preambles (R. I-41-42) recite the contract of April 25; recite that it is desired to fill the tanks built under that contract as fast as they are completed and also to procure for the Navy additional amounts of fuel oil and other petroleum products in storage at Pearl Harbor, T. H., and elsewhere; that the Secretary of the Navy in his letter of November 29, 1922, copy of which is attached, has requested the Secretary of the Interior as administrator of the naval petroleum reserves to arrange for such additional fuel oil and other petroleum products in storage through exchange therefor of additional royalty crude oil belonging to the Government in the California naval reserves, the probable cost of the additional products and storage immediately planned for being estimated at fifteen million dollars, more or less; recite the willingness of the contractor to do the work and furnish the oil, and then recite as follows:

And whereas the furnishing of such additional amounts of fuel oil and other products in storage on the basis of exchange for the Government royalty crude oils cannot be accomplished from the present leases in the California naval reserves. They then recite the preferential right of Pan American to leases in Naval Reserve No. 1, and recite that the contractor "is planning to provide refinery facilities at Los Angeles, California," etc.; and states "the following agreement is supplemental to the said contract of April 25, 1922."

Article I (R. I-43) provides for bond, and then in numbered paragraphs provides as follows:

1. For the provision of fuel oil to fill the storage tanks built under the April contract.

2. For the construction at Pearl Harbor of additional facilities at cost.

3. For the furnishing of fuel oil to fill the new construction and for charging the Government for such fuel oil at the Bay Point market price plus cost of transportation.

4. For the furnishing of other petroleum products than fuel oil for filling the facilities to be constructed at Pearl Harbor for such products under the present contract, at contractor's current sales price, not, however, to be in excess of the current price under navy contracts.

5. For furnishing free storage for 1,000,000 barrels of fuel oil and for the filling of that storage with fuel oil to be exchanged for crude oil after the Government shall have delivered enough crude oil to have paid for all of the above recited matters.

6. To maintain subject to the demands of the navy 3,000,000 barrels of contractor's C grade fuel oil on the Atlantic coast in commercial storage, any part of said fuel oil to be allocated to the navy on thirty days' written notice and held for not more than six months in storage for the navy at one cent per barrel per month storage charge, said oil when purchased by the navy to be paid for at market prices.

7. To go on to other storage projects beyond the Pearl Harbor project if and when the navy shall have reimbursed the contractor for all matters previously agreed to be done.

8. An option for purchase at ten per cent. less than market price of fuel oil.

9. An option to purchase other petroleum products on the same basis.

Article II. (R. I-47):

A. Agreement by the Government to deliver all its royalty oil from No. 1 and 2 reserves, subject to its obligation to deliver enough to pay out the contract of April 25, 1922, "until the Government's obligations under this instant contract are discharged, and in any event for a period of 15 years from the date of the expiration of said contract of April 25, 1922, the Government **to be given credit by contractor for such crude oil delivered by the Government at the published field price thereof on date of delivery,**" and for gas and casing-head gasoline at certain rates provided. It then provides: "any surplus of Government **credits** thus accruing are to be **satisfied** by delivery of fuel oil or other petroleum products, by construction of additional storage facilities, or **to be payable in cash,** as the Government may at that time elect." (R. I-48.)

B. A covenant to lease to Pan American Petroleum Company lands in Naval Reserve No. 1 described in the accompanying lease of same date. (R. I-48.)

Article III (R. I-49) deals with gauging of the oil and provides that the interest item mentioned in the contract of April 25, 1922, shall cover fuel oil as well as construction.

This agreement abandons any thought of exchange of one thing for another. It is frankly a "dollar" contract. The clumsy expedient of translating dollars into illusory and fictitious barrels of "basic" crude oil (which means nothing, because basic crude oil means nothing) has been abandoned; and the books and accounts under this contract were kept in dollars and cents (R. II-688).

(d) *The lease of December 11, 1922.*

Pursuant to the preferential right which is recited in the contract of December 11, 1922, and which was created by the contract of April 25, 1922, and as the contract of December 11, 1922, states, in order to obtain crude oil to be used as a medium of payment for storage and the construction of storage facilities, this lease, covering the whole unleased portion of Naval Reserve No. 1, was made to the nominee and subsidiary of the Transport Company,—Petroleum Company. It forms part of the consideration to Transport Company for entering into the contract of December 11, 1922. No extended analysis of it need be given, as it is an ordinary form of oil and gas lease, specifying certain royalties to be paid to the United States out of the crude oil and gasoline recovered by the lessee.

2. The Act of June 4, 1920, did not authorize the execution of the contracts and leases.

(*Point III, Appellants' brief, p. 100.*)

(a) *What the act is in fact.*

What has been spoken of for the purposes of this case as the Act of June 4, 1920, is not in fact an independent Act of Congress. The language quoted on page 14 of Appellants' brief, is a proviso or rider to that portion of the annual Naval Appropriation Act of June 4, 1920, for the ensuing fiscal year. One section of that appropriation bill deals with the subject "Investigation of fuel oil and other fuel" (41 Stat. 812-813); and under that heading appropriates \$30,000 for an investigation of fuel oil, gasoline and other fuels adapted to naval requirements, including the question of supply and storage, and the availability, economically and otherwise, of such supply as may be allowed by the

naval reserves on the public domain, etc. Then occurs a proviso containing the language quoted at page 14 of Appellants' brief. The proviso has a proper place in the act because it makes an appropriation of \$500,000 for the purpose mentioned in the proviso.

(b) *The purpose of the act.*

It is important to form a correct idea of the purpose in the mind of Congress in enacting the Act of June 4, 1920, since the terms of that act with which we are here most concerned, especially the power of sale, exchange and storage, will be colored by the conception of its general purpose. Appellants argue, in brief, that Congress contemplated a right about face with regard to the reserves, that is, a departure from the policy of an underground reserve established and adhered to since 1912, and an adoption of an aboveground fuel-oil-in-storage policy. We believe Congress contemplated no such thing, but that on the other hand the language of the act and its surrounding circumstances and history will show that its purpose was to enlarge the powers of the Secretary of the Navy so that he might at will provide adequate protection against drainage where such was needed.

Consider first the statutory situation. The underground reserve idea had been in well known effect in the case of Reserves Nos. 1 and 2 since their withdrawal by President Taft in 1912. It was impliedly ratified by Congress in the year 1920 itself, in that the Leasing Act of February 25, 1920, conferred a right to lease land in the naval reserves only where there were already producing wells and in compromise of valid existing claims.

Had Congress intended or expected a sharp departure from this established policy presumably some definite

indication to that effect would be found in the Act of June 4th. Instead, this short enactment, which is itself a mere rider to the Naval Appropriation Act for the fiscal year 1921, begins its operative language with reference to the naval reserves by the word "conserve." The further language of the act does give the Secretary of the Navy an unrestricted power as to how much of the lands he shall lease. We think, however, that it shows an assumption on the part of Congress that this power was needed, and presumably therefore would be exercised, for the purpose of more adequate protection of the reserves against drainage from neighboring drillers.

That this would render advisable development of certain portions of the land by leases under which royalty oils would accrue to the United States, and that such oils, or part of them, would be sold, is apparent from the act, which states, "that such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the Naval Petroleum Reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922." In other words, from the sales of royalty oil a sum of \$500,000 is made available to enable the Secretary to carry out the necessary development and storage which might be incident to protection of the reserves.

We submit that this was a reasonable provision for such purpose if, as we have argued, Congress contemplated only such development as was needed for protection. We agree, however, with the Appellants, that it was a wholly and ridiculously insignificant appropriation if Congress contemplated that the Secretary of the Navy would suddenly throw the reserves open to unlimited exploitation.

It must not be forgotten in this connection that we are not dealing merely with Reserves Nos. 1 and 2 in

California. There were in all three petroleum reserves with a total acreage of nearly eighty thousand acres (R. III-1072) and in addition two shale oil reserves, the extent of which we are not informed in the Record. Certainly had Congress anticipated the full development of such a vast and admittedly rich reservoir of oil, some indication of that expectation and some provision for the disposal of the resulting products or money would be found in the act.

Certainly something on such a subject would have found its way into the debates of Congress or the reports of committees.

If we look to departmental construction of the purpose of the act we find that for more than a year after its passage the established policy of an underground reserve was rigidly adhered to. Not until Secretary Fall kindled the imagination of certain enthusiasts in the Navy Department in the summer of 1921, with the idea of an exchange for storage proposition, did the thought occur to anyone even to investigate as to whether the act permitted such a policy.

But this is not all. The uncontradicted Record in this case shows that down to the very end of all the transactions here involved, the Secretary of the Navy maintained a fixed purpose of leasing only where according to representations in which he had confidence such leasing was required as a protective measure. Robison knew this was the policy of his chief and the policy of Congress. He testified (R. III-1141) "Mr. Denby had a fixed idea that the immediate necessity was the drilling of offset wells where they were required. Witness thinks that it was his idea to keep as much of the oil in the ground as long as he could, and the policy of his department was fixed by him. **Witness understood that the policy when the reserves were created**

was to retain as much of the petroleum as could be retained in the ground against some time when petroleum would become so scarce or so dear that the United States would need to drill on this reserve supply."

Moreover, Fall well understood the purpose of the legislation. More than a year after its passage (July 18, 1921), he wrote to the Vice President of the Pacific Oil Company a letter (R. I-143) answering a suggestion of the Pacific Company that for the better conservation of the Government oil reserve as well as the reserved oil of the Pacific Company, an exchange of sections within the reserve might be desirable, and in this letter referred to the proposition as one "by which **the primary purpose of the naval reserves—namely, the retention in the ground of a supply of oil ample for the needs of the Navy in the future**—may be accomplished and at the same time the interests of your company, through its private holdings in the reserve, duly protected."

Apart, therefore, from the question of the extent of power granted in the act, it is plain that the Appellants alone have discovered in it any purpose or intent to put in force a policy of complete exploitation and above-ground storage. It is only by presupposing the latter policy that their argument for the supposed necessity to exchange oil for storage in order to carry out the purpose of the act finds any basis.

(c) *Disposition of proceeds of royalty oil.*

Prior to the Act of June 4, 1920, the royalty oil accruing to the Government from compromise leases made on Naval Reserve Lands, was, pursuant to the Leasing Act of February 25, 1920, sold; and the receipts from such sales were paid into the Treasury. This was the express mandate of the Act of February 25, 1920. After the

passage of the Act of June 4, 1920, any cash received from sales of royalty oil from leases made pursuant to it would also go into the Treasury as miscellaneous receipts—R. S. 3617, 3618 (quoted in full at p. 219 this brief), providing that all moneys received from the sale of Government property, shall be covered into the Treasury.

There is no dispute about these propositions, and in fact the Record is full of references to this situation. Admiral Robison repeatedly calls attention to the fact that these proceeds of sales of royalty oil were going into the Treasury, and that consequently the Navy was losing the benefit of the naval reserve oil because once the money got into the Treasury it could not be gotten out again for the benefit of the Navy unless and until Congress appropriated it. (R. II-957, 959, 980, III-1075, 1082.)

Everyone recognized that under the Act of June 4, 1920, the royalty crude oil coming to the Government under any leases theretofore made or thereafter to be made on lands in the naval reserves could be exchanged for fuel oil and other petroleum products useable by the Navy in its current operations. Nobody suspected or suggested apparently that the royalty oil could itself be used as a consideration for the procurement by the Navy of other physical property and assets, until more than a year after the Act of June 4, 1920, became law.

(d) *Genesis of the plan to avoid payment into the Treasury.*

In the summer and autumn of 1921 Fall hit upon, and he and Robison developed, the plan of so using royalty oil and attempting to justify its use under the Act of June 4, 1920. We shall not stop here to repeat what we have already elaborated: that there was in

Fall's mind and in that of many others in the departments, grave doubt as to the legality of this program. The reason for these doubts is not far to seek. It at once appears when we realize the magnitude of the plan Robison had in mind.

He had it in mind to leave out of account altogether the purpose of the Act of June 4, 1920, viz., the retention of oil in the ground and the protection of that oil so far as possible by defensive drilling, because he thought he saw a way for the Navy Department to provide fuel depots for the storage of great quantities of petroleum products without asking leave of Congress for their location, and without having Congress consulted as to their extent and cost.

There is no contradiction that his plan soon enlarged itself into a program for the taking out of all the petroleum in the reserves, thus reversing the policy adopted by Congress and adhered to for many years, and using the royalty oil which would come to the Government from the lessees for the construction of approximately \$50,000,000 worth of structures and appurtenances and the filling thereof with approximately \$50,000,000 worth more of petroleum products useable by the Navy. Robison says in so many words that the plan was to go on and on from one project to another practically as long as petroleum could be gotten out of the naval reserves to furnish consideration for defraying the costs of these projects. (R. III-1103.)

The Act of June 4, 1920, authorizes the Secretary of the Navy to "conserve, develop, use and operate the lands in his discretion, directly or by contract, lease or otherwise." Therefore, under the power thus given the plan contemplated the leasing of the reserves. The act goes on to authorize the Secretary of the Navy "to use, store, exchange or sell the oil and gas products"

of the reserves "and those (*i. e.*, the oil and gas products) from all royalty oil from lands within" the reserves, "for the benefit of the United States." The plan could not be accomplished by the storage of the **crude oil**, nor could it be accomplished by the use of the crude oil, for the Navy did not use crude oil, but a derivative—fuel oil.

The burden of Robison's complaint was that to sell the crude oil defeated the plan, because the proceeds of the sale under the law were bound to go into the Treasury of the United States. (R. III-1075.) The expedient was adopted of "exchanging" the crude oil for so called reserve fuel oil and petroleum products, and as an ancillary or incidental matter, as it is said, "exchanging" this royalty crude oil also, and in addition, under construction contracts for the building of naval fuel depots in which the fuel oil and petroleum products acquired were to be stored at various points in the United States and its possessions.

It is small wonder that the exchange-for-storage idea, carried to such proportions as Robison proposed, staggered Fall and that at first he was very doubtful of the legality of it (R. III-1076). It is small wonder that the Bureau of Yards and Docks of the Navy thought the plan of doubtful legality—so doubtful, in fact, that they questioned whether any bidders would submit proposals under it. It is small wonder that all the oil concerns consulted, except the Pan American, were advised by their counsel that the plan was illegal. We recognize that the attitude of any or all of these persons is in no wise conclusive upon any court upon the question of the legality, but it is at least persuasive, that the legal opinion in and out of the department seems to have been almost universally opposed to its legality.

So far as Fall and Robison were concerned, the legal difficulty was overcome by the opinion of Judge Advocate General Latimer. We call attention to the fact that this opinion definitely held that "the authority granted 'to exchange' is unrestricted; *i. e.*, the Act does not specify nor limit what may be taken in exchange for the oil and its products." (R. II-701.) This goes farther than counsel for Appellants dare to go in defending the contracts of April 25 and December 11, 1922. As we shall hereafter point out, they limit the authority and power of the Secretary under this act to an exchange for so-called "fuel reserve" purposes. As we shall hereafter endeavor to point out, this is a purely arbitrary limit, and there is really no escape from one of two positions: Either that the act authorized an exchange of royalty oil for petroleum products and for nothing more, or it authorized the exchange of the royalty oil for anything that the Secretary of the Navy in his uncontrolled discretion considered "for the benefit of the United States."

(e) *The act does not authorize the contracts.*

(*Points I and III, Appellants' brief, p. 120.*)

We assert that not only was the act passed in pursuance of a conservation rather than of a development and exhaustion policy, but that disregarding all other statutory and constitutional provisions, and supposing it stood alone, the act of June 4, 1920, does not confer an authority for the making of the contracts under attack.

We shall here discuss the matter upon the assumption that the Secretary of the Interior has and had no part in the making and administration of the contracts and leases. The question then becomes, does the act confer upon the Secretary of the Navy authority for the mak-

ing of such contracts and leases as were made in this case?

It may be conceded that the language of the act confers broad powers. A direction to take possession of the lands in the reserves which are free of claims, and "to conserve, develop, use and operate the same in his discretion, directly, or by contract, lease or otherwise," gives him a right to make leases or operating contracts.

The act then says: "and to use, store, exchange or sell the oil and gas products thereof, and those from all royalty oil from lands in the Naval Reserves, for the benefit of the United States." This language must unquestionably be read in connection with the remainder of the act. We shall analyze these powers separately.

(1) "To use."

Use connotes consumption. It excludes sale or barter or exchange. Particularly pointed is this fact when we find the word in collocation with other words, which distinguish the idea of parting with the oil from the idea of use.

But, further, when we examine the last two provisos of the act, we find the "use" specifically limited. The one proviso appropriates "not exceeding \$500,000" of the moneys turned in or to be turned into the Treasury from royalties on Naval Reserve lands prior to July 1, 1921, "for this purpose." So that any "use" that is to be made of the oil must not cost in excess of that sum. The other proviso makes clear that "use" means "consumption" for it requires that the \$500,000 appropriation shall be "reimbursed from the proper appropriations, on account of the oil and gas products from said properties **used by the United States** at such rate not to exceed the market value of the oil as the Secre-

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tary of the Navy may direct." It is, therefore, clear, that if the Government "uses" this oil for any purpose for which Congress has appropriated money for the purchase of oil, such appropriation must be debited and the appropriation made in the Act of June 4, 1920, must be credited with the value of the royalty oil so "used."

(2) "To store."

The effect of the use of this word can only properly be ascertained by inquiring what it is the act authorizes the Secretary to store. Obviously what he may store is "the oil and gas products thereof" (*i. e.*, of the lands). Also, he may store "the oil and gas **products** from all royalty oil from lands in the naval reserves." The power to store, therefore, covers both the royalty crude oil which is a product of the reserves and the products of the royalty oil. There are certain products such as gasoline and gas, a quantity of which is obtained from the royalty crude oil. As the Secretary is given power to operate the reserves by contract or otherwise, it is entirely conceivable that he might make a contract whereby the operator would turn over to him crude oil and/or certain of the products of the crude oil which are obtained therefrom. These he might store.

What may he spend for this purpose? The answer is found in the next proviso. There is "made available" "not exceeding \$500,000" "for this purpose." What purpose? Obviously, one purpose is "to store." Did Congress intend that the Secretary might spend the \$500,000 in cash and then spend \$57,000,000 worth of royalty oil for storage facilities?

Moreover, these contracts are not for the storage of "the oil and gas products" of the naval reserve lands, nor for the storage of the "products" of such oil and gas. The oil and gas products from the lands are under

these contracts bargained and bartered away—for what? (1) For a construction contract to build facilities. Surely that is not “storing” them. (2) For a covenant that these facilities will be filled with what? With fuel oil, etc. Whence? Not from the naval reserves, but from whatever source the contractor may buy them. And if he fails, what then? A suit for damages by the United States. The oil and gas products are gone, their products in turn,—the gasoline, the fuel oil, etc., have been manufactured by the contractor (or, as in the present case, by his vendee, Associated), and sold to the public. The United States retains neither title to nor lien upon them. It has a contract right to call upon the contractor to furnish other “products” bearing no relation, **save one of value**, to those made from the royalty oil it owned and bargained away. Can such a performance be denominated a storing of the oil owned by the United States or a storing of the products of its oil? We say not.

(3) “To exchange.”

On this phrase Appellants, in effect, base their whole argument. We contend that however the phrase is construed it cannot carry the load of these contracts.

a. Exchange for Fuel Oil Intended.

The exchange Congress had in mind was undoubtedly for fuel oil. That was what the Navy was then using. Congress had not authorized the creation of reserve fuel depots. It had authorized only depots for current-use fuel oil.

b. Power to Exchange Not Unlimited.

The exchange contemplated was limited to fuel oil and other derivatives of petroleum. It could not extend to the acquisition of **anything** which might be

of benefit to the United States. In holding that it did so extend, we submit, the Judge Advocate General of the Navy fell into grave error. He held the word to be unlimited. If he is right, royalty oil may be exchanged for a battleship, for a navy yard, for land, for aviation, for airplanes, for uniforms, for ships' stores, for guns, for what not.

Of course, even on this construction of the act, the Secretary of the Navy would be bound to exchange only for **something which would be a "benefit" to the United States.** Did Congress intend to invest him with the unrestricted discretion to expend all the royalty oil which might accrue to the United States for anything which he might think beneficial?

We do not wish our position to be misunderstood. We do not claim, and never have claimed, that where a discretion is vested in an executive officer, the courts may review his exercise of that discretion. So long as he stays within the limits of the powers granted him, the methods he adopts for the exercise of those powers are not subject to review. **The question is and always has been what powers were granted** to the Secretary of the Navy by the Act of June 4, 1920, and not whether he exercised those powers in a wise or discreet manner.

We think it entirely clear that no such intention existed or can be drawn from the words of the act. We again repeat, it is not a question whether the Secretary of the Navy exercised his discretion wisely or unwisely. The question is whether the Court shall construe this act as granting such unbridled legislative discretion to an executive officer.

Appellants' counsel are forced to take the position that while the word "store" as used in the act does not expressly authorize the storage of something obtained by the Secretary of the Navy through an exchange,

yet by implication, if the Secretary of the Navy is authorized to exchange royalty oil for some commodity or other he is also authorized **to do whatever is necessary** to obtain proper storage for the thing acquired.

The argument in logic must go to the length of saying that if the Secretary of the Navy were authorized by an act to exchange royalty oil for airplanes, he would, by implication, be authorized to build hangars and depots for these airplanes, and pay for them in royalty oil. The only alternative to this argument would be for Appellants to allege that the airplanes were "products" of the royalty oil and as such products could be stored under the authority to store the products of royalty oil. It is of course obvious that the word "products" cannot be used and was not used in fact in any such sense. A thing I buy with a dollar is not the product of a dollar, and a thing I get in exchange for a chattel is in no sense a product of the chattel.

c. The supposed intent of Congress.

There was in the Court below, and is in Appellants' brief in this Court, much argument in an effort to convince the Court that the provision and the filling of a fuel depot at Pearl Harbor, Hawaii, was in effect in the contemplation of Congress as a probable result of the operation of the Act of June 4, 1920, at the time that act was passed. They definitely assign to Congress an intent in the passage of the act. They variously designate it as an act intended to create a fuel reserve, as an act intended to meet military necessity, as a national defense act, and similar phrases, and it is therefore argued that if what was done by the contracts of April 25 and December 11, 1922, was something that tended to create a reserve of fuel, that tended to strengthen the national defense, it was clearly a matter

within the purview of the legislators who passed the act. So far as we can gather from their brief, there is nothing specific from which they deduce this general purpose. It looks very much like an assumption on their part.

The assumption of the purpose Congress had in mind, followed by a construction of the act in the light of that assumed purpose, is the old fallacy of begging the question. The very thing that we are trying to do is to find out what the purpose and intent of the act was. When we attribute to the Government the policy of storage in the ground we point to definite facts, namely, the executive withdrawals and separate treatment of the naval reserves in the Leasing Act of February 25, 1920, and the actions of the Navy Department over a number of years; but the Appellants point to no definite facts upon which they base their assumption. They merely state it and then use it as a guide for interpreting the act.

Furthermore, the latter part of the assumption, namely, that the act sought to make the oil available for naval purposes, is too broad a statement. **There is nothing to evidence an intent to take all the oil out of the naval reserves. On the contrary it was desired to take out as little as possible.** The Secretary of the Navy did not want to make the oil in the reserves presently available for naval purposes. He felt that he would be forced, however, either to lose some of it or presently to use it. To authorize this limited use was one of the purposes of the Act of June 4, 1920.

The assumption is also unwarranted because there was no authorization in the Act of June 4, 1920, to construct "fuel depots." This is highly significant in view of the general policy that "fuel depots" should not be built except when authorized by Congress. There

is in the act the appropriation of \$500,000 for the purposes of the act and whatever storing of oil might be allowed as one of the purposes was obviously limited by the extent of this appropriation. We discuss this at greater length hereafter.

Although Appellants apparently do not realize the fact, their assumption of the general purposes of the act logically forces them to take the same view of it as did the Judge Advocate General of the Navy, for, as we understand their argument, it is that since the act authorized a storing of oil and since its purpose was to make oil available for naval purposes, it authorized the construction of storage reasonably necessary to accomplish these things. Upon the same premises we may say that since the act authorized a use of the oil and since its purpose was to render the oil available for naval purposes, it authorized battleships and airplanes because such things are reasonably necessary for the use of naval oils; such things benefit the United States and carry out its naval policy. We submit that there is nothing specious in this argument, but, on the contrary, that it fairly rests upon the same premises as does the position of the Appellants with regard to storage.

At page 114 of Appellants' brief it is suggested that the act does not, under Appellants' construction of it, give the Secretary authority to exchange oil, *e. g.*, for battleships, because it does not give him "sole discretion as to every matter connected with the entire Navy." But if it is an all-sufficient code, why does it not give him such discretion? Its language is that he may exchange the oil "for the benefit of the United States." Are not battleships beneficial? Where do Appellants find in the act the limitation to the "reserve idea," on which they so constantly dwell?

While we are speaking of this reiterated argument

about the contracts in this case rendering oil available for naval use and thus preserving the reserve idea, and therefore being within the purview of the act, and therefore lawful, let us refer to several other considerations.

Appellants must and do admit that there is nothing in the law to prevent the Secretary, once the United States has the storage facilities and the fuel oil, from changing the same to a depot for current-use fuel. Thus he may, by a mere order, destroy entirely the "reserve idea." Surely the legality of what has been done cannot rest on the question of the intended use of the fuel depot when contracted for, or the whim of the Secretary of the Navy.

Again, Appellants admit, as they are bound to admit, that the act authorizes the sale for money of the royalty oil. They admit, as they are bound to admit, that upon such a sale the proceeds of the sale must go into the Treasury, subject to appropriation by Congress. If the act is a national defense act intended to enable the Secretary of the Navy to create and perpetuate an above-ground reserve of petroleum products, why was it left to him to destroy any such plan by selling the royalty oil and allowing Congress to determine what should be done with the money? The argument that if and so long as the Secretary stayed within the orbit of the reserve idea, whether reserve above ground or reserve under ground, what he did was within the act, and that if he went outside the orbit of that concept what he did was violative of the act, will not do. That argument cannot be used to buttress what was done in this case.

As we have above pointed out, our opponents admit that under their theory power rested in the Secretary to destroy the reserve character of the storage at his wish or whim, by ordering the stored oil to be currently

used. As we have pointed out, he could at any moment destroy it by a sale of royalty oils. We come back inevitably to the proposition that if the power to exchange is to be construed to give the Secretary more than the right to exchange royalty oils for other petroleum products, the act becomes a roving commission appropriating some hundreds of millions of the property of the Government to be transferred and expended for such consideration as the Secretary of the Navy may in his judgment think best.

We see, therefore, that, as we have in the preceding section of this argument contended, there is no middle position; either the power to exchange was unlimited and unrestricted, or it was limited to exchange for fuel oil and similar petroleum products.

d. The transactions under the contracts of April 25 and December 11, 1922, are not in fact exchanges within the meaning of the act.

(Point III, Appellants' brief, p. 125.)

We have previously in this brief analyzed the provisions of the contracts. We contend that the transactions provided for in those instruments are not exchanges such as the Act of June 4, 1920, authorizes. In them the parties use the language of sale rather than that of exchange. We do not intend here to repeat what we have above said in our analysis of the contracts (this brief, pp. 188 to 198). Not only the nature of the transaction, but the language used by the parties, shows that they realized a sale was being consummated, and not an exchange. Everything indicates that the emphasis was upon value in dollars as of the time the royalty oil was delivered to the contractor, and as of the time the fuel oil was delivered to the Government and construction work done for the Government.

The legal concept of an exchange as distinguished from a sale is a transaction whereby little or no emphasis is placed upon value; whereby the parties intend to trade one specific article for another specific article or articles of property. When the element of value creeps in as a primary consideration we have a sale and purchase rather than an exchange. In these transactions the element of value is not only predominant; it is the essence of the transaction. The machinery would not work without the valuation of the crude oil in dollars and the valuation of the storage construction in dollars. The transaction is not legally an exchange.

The meaning of the word "exchange" as used in the act is to be found by reference to the facts and circumstances then existing. The policy up to the passage of the act was to retain the oil in the naval petroleum reserves underground. It became known that some of it, particularly the oil in Naval Petroleum Reserve No. 2, was subject to drainage. The act was confessedly passed to give the Secretary of the Navy an opportunity to save such oil, if he could, as was subject to drainage. The plan evolved and carried out in the leases and contracts converts the royalty oil somewhat as follows:—

The royalty may average about twenty per cent. of the total oil removed. It takes roughly two-thirds of that twenty per cent. to build and equip the storage facilities for fuel oil and about one-third of that twenty per cent. to exchange for the fuel oil to go into the storage facilities. The result of the operation of the plan is that the United States has in the end in storage of oil an amount representing not over eight per cent. of the value of the crude oil which came out of the reserve. We do not make this argument for the purpose of showing that the Secretary misused his discretion. We make it for the purpose of showing the baneful

result of this performance if it was properly within his discretion. It shows how fallacious is the argument of the Appellants that just such a performance as this must have been in the contemplation of Congress when it passed the act and used the word "exchange." We make the argument to show that Congress never by the use of that word **granted any such power.**

We further contend that the word "exchange" cannot possibly be given a meaning whereby it would authorize an agreement to deliver a commodity to another, in "exchange" for which that other enters into an executory contract to perform work and labor and build a construction project according to certain plans and specifications. Certainly when Congress used the word it did not mean that royalty oil might be pledged to a building contractor as the consideration for such an executory building or construction contract.

The Appellants, however, contend that it is immaterial whether the transaction is technically an exchange or a sale, for they say if it is not an exchange, then surely it is a sale, and the act authorizes both sorts of transactions. We shall discuss this proposition under our next heading.

(4) "To sell."

It is plain, as Appellants allege, that the Act of June 4, 1920, conferred upon the Secretary of the Navy full power to sell the royalty oil accruing from leases of naval reserve lands. When Congress inserted into that act the word "sell," did Congress have in mind that the courts have sometimes said that the consideration received upon a sale may be something other than money? Our opponents say this is entirely probable. We say that the plain intendment of the act makes it not only improbable but impossible. Congress had authorized the Secretary to use, store or exchange the

royalty oil, and as a final alternative gave him the right to sell it.

Do Appellants contend that an act of Congress authorizing an administrative official to sell property of the United States means that he can take that property, hand it over to a contractor and make that transfer the consideration for a building contract by the contractor? It seems to us that to state the proposition is to answer it.

Secretary Fall and Admiral Robison well understood that if the Navy exercised the option to sell its royalty oils, the proceeds of those sales must go into the Treasury where, as Robison says, they would become unavailable except by appropriation by Congress, and it was the necessity to go to Congress that he wanted to avoid. (R. III-1075.)

It was for the very reason that they knew that if the transaction were to be a sale it must be a sale for money, and that the plain intendment of the act was that it should not be a transfer for a construction covenant, that Secretary Fall, on April 12, 1922, wrote Secretary Denby suggesting an amendment to the law whereby the Navy should be authorized to sell the royalty oils and apply the proceeds of the sale upon construction contracts or to exchange it for storage facilities. (R. I-393.)

None of the defenders of these contracts ever suggested that the transaction was a sale until Appellants so urged in the Court below, as an alternative to their argument that it was an exchange.

If their argument is sound, then Congress, in authorizing the officials of the United States to sell property of the United States, would be under the necessity of stipulating in every such act that the sale must not be by way of transfer of property of the United States for

property of the contractor. The persons who acted in this matter for the Government, and the Appellants themselves, realize only too well that if the royalty oils were in fact "sold," they must be sold for money, and that under the law the proceeds of the sales must be covered into the Treasury as miscellaneous receipts.

Section 3617 of the Revised Statutes provides as follows:

"The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in the next section, shall be paid by the officer or agent receiving the same into the treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department."

Section 3618, as amended February 27, 1877, c. 69, Sec. 1, 19 Stat. 249, provides as follows:

"**All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind**, except the proceeds of the sale or leasing of marine hospitals, or of the sales of revenue-cutters, or of the sales of commissary stores to the officers and enlisted men of the army, or of materials, stores, or supplies sold to officers and soldiers of the army or of the sale of condemned navy clothing, or of sales of materials, stores or supplies to any exploring or surveying expedition authorized by law, shall be deposited and covered into the treasury as miscellaneous receipts, on account of 'proceeds of Government property,' and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law."

It was confessedly to escape these very provision that it was attempted to cast the transaction into the form of a so-called "exchange contract" rather than a sale contract.

Our contention with regard to the meaning of the word "sell" as used in the act is supported by another clause in the act. The appropriation clause states "that such sums as have been or may be turned into the Treasury of the United States as royalties from lands within the Naval Petroleum Reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922." The only sums that could be turned into the Treasury from royalty oils would be the proceeds of sales thereof. It is quite evident, therefore, that Congress contemplated that the Secretary of the Navy might continue to sell the royalty oils, as had been the practice, and it made the proceeds of such sales as might be turned into the Treasury up to July 1, 1921, available for the purpose of the act.

At pages 139 and 140 of their brief Appellants wholly misconceive the position taken by Government counsel from the start of this case. It was that neither the word "exchange" nor the word "sell" describe what was done in this case, and that it was never the intent of Congress by the use of those words to authorize the employment of royalty oil as the medium of payment for a building construction plan of fuel depots for the Navy. The acts of Congress on the subject of sales of Government property were quoted to show that in legislation which Congress had passed on the subject it obviously contemplated that sales would be for money and that it never intended by authorizing a department head to sell property to allow him to use it as a means of procuring for his department some other property

but did intend that the proceeds of sale should go into the Treasury where they would be subject to appropriation by Congress. We have never contended that the Secretary did not have power to sell royalty oil, but we have always contended that such a transaction as the contract of April 25, 1922, or that of December 11, 1922, was not within the fair intendment of the word "sell" as used in the act.

(f) *The appropriation clause of the Act of June 4, 1920, makes Appellants' construction untenable.*

(Point II, Appellants' brief, p. 120.)

The second proviso of the clause of the act in question reads that "such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922; * * *."

The important language in the above clause consists of the words "for this purpose." The purpose of the act included "store", used with reference to royalty oil and the products thereof.

What is the effect of the language of the appropriation clause and the next following clause on the scope of the power to store? We have above quoted the appropriation clause and we now call attention to the clause immediately following, which directs the reimbursement of the \$500,000 appropriation "from the proper appropriations on account of the oil and gas products from said properties used by the United States."

Obviously when the appropriation clause states that the appropriation is for "this purpose" the purpose includes storage of oil. If what the Government is to receive under the contracts in exchange for its royalty oil may be designated as a "product" of that royalty

oil, the act gives the Secretary of the Navy an appropriation for the storage thereof.

The appropriation also clearly covers the storage of the royalty oil itself if the Secretary should decide to store it. If, when the Secretary has exhausted that appropriation, he attempts to go further and exchange oil for storage, this in effect authorizes him to increase the amount of the appropriation.

The matter is most clearly illustrated by taking for example the storage of the royalty oil itself as it comes from the ground. Suppose the Secretary desired to store it. Suppose he expended the entire \$500,000 for this purpose and suppose that then more royalty oil was coming in which he thought it wise to store and not to sell. Do Appellants contend that the authority to store and the appropriation for "this purpose" leave an opening room for the implied authority to bargain away some of the royalty oil to get storage facilities for the balance of the royalty oil? Such a transaction would amount to an arbitrary increase of the appropriation made by Congress by the mere fiat of the Secretary of the Navy.

As we understand Appellants' argument, they agree that the Secretary may use the \$500,000 for building storage. In other words, they agree that the "purpose" mentioned in the appropriation is *inter alia* the provision of storage. But they then argue in effect that Congress also made what they styled in the oral argument in the court below an "oil appropriation" for the same purpose and **they infer such an oil appropriation from the use of the word "exchange."** It will, however, be noted that nowhere in the act is the Secretary authorized to exchange royalty oil "for this purpose."

As an alternative argument Appellants assert that the authority to store vested in the Secretary implied authority to provide the means of storage. In making the

argument they entirely overlook the fact that the act itself, by an appropriation, provides the means of storage.

Stripping off all casuistry the Appellants' argument comes to this: that where an act of Congress (a) authorizes an officer of the United States to do a certain thing and (b) appropriates \$500,000 for "this purpose," if the \$500,000 is insufficient to do all that the official thinks should be done in the premises he may do more than the appropriation will permit and make the United States liable to pay for that for which he has contracted. It seems to us that to state this proposition is to answer it, but if any further answer be needed the authorities and the statutes are clear.

But there are other acts declaring the general policy of this Government, which render void the contracts in question. They are:

R. S. 3732 (U. S. Comp. Stat. 1918, Sec. 6884) (Sec. 6233, Barnes Code):

"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfilment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

R. S. 3733 (U. S. Comp. Stat. 1918, Sec. 6886) (Barnes Code, Sec. 6234):

"No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

Act of June 12, 1906, c. 3078, 34 Stat. 255 (U. S. Comp. Stat. 1918, Sec. 6885) (Barnes Code, Sec. 6235):

"No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfilment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

Act of June 30, 1906, c. 3914, Sec. 9, 34 Stat. 764 (U. S. Comp. Stat. 1918, Sec. 6763):

"No Act of Congress hereafter passed shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed."

The foregoing statutory provisions respectively forbid any contract being entered into, such as those in issue in this case, which will bind the Government to pay a larger sum than the amount in the Treasury appropriated for the specific purpose, **unless the act shall in specific terms declare that such contract may be executed.**

**Sutton vs. United States (1921), 256 U. S. 575,
Hooe vs. United States (1910), 218 U. S. 322,
Chase vs. United States (1894), 155 U. S. 489, and
Bradley vs. United States (1878), 98 U. S. 104,**

are typical cases showing that this Court construes this matter strictly and never from a general authority to contract or to do a certain act conferred upon an executive official draws the conclusion that the policy of

Congress touching the limitation of projects by appropriation was intended to be overruled or an exception created.

Finally, what shall be said of the effect of the reimbursement provision so far as storage is concerned? The last proviso requires the appropriation of \$500,000 to be reimbursed from the proper appropriation on account of the use of the royalty oil. The appropriation of \$500,000 is itself an appropriation for the procurement of storage. Shall it be reimbursed from itself? Such a construction involves an absurdity and there is no absurdity whatever if we read the act in its natural meaning. If royalty oil is used to procure fuel oil which has been appropriated for by Congress then the fuel oil appropriation is to reimburse this \$500,000 appropriation. Such an operation is easily understood, but if royalty oil is used to procure storage by so-called exchange, pray how can the appropriation be reimbursed out of itself to the extent of the value of that storage?

The plain meaning of the act is that for any purposes comprehended within it where it was necessary to expend money, (and of course it would not be necessary to expend money in a sale of royalty oil or in an exchange of that royalty oil for other petroleum products for the use of the Navy), the limit of the money so to be expended, subject only to reimbursement out of fuel oil appropriations and similar appropriations, should be \$500,000. It will not do to claim that by the use of the innocent word "exchange" Congress has in some magic way increased this appropriation so that the Secretary of the Navy is no longer limited to the amount of \$500,000 in the storage he may provide, but may provide, without the consent of Congress, storage to the extent of half a hundred millions of dollars.

3. The contracts were violative of the law as to the location and establishment of fuel depots.

(Point V, Appellants' brief, p. 145.)

Admiral Robison has repeatedly stated, as we have above shown, that it was to avoid taking cash for royalty crude oil that the construction contracts were made. Accordingly the costly plan was adopted of making these construction and storage contracts, the consideration being payable in crude royalty oil. Although Admiral Robison realized that the power to construct such fuel depots lay within the exclusive province of Congress he decided not to go to Congress for authority to establish them. Consequently Congress has never approved of the fuel depots established under the contracts. These fuel depots form part of a building plan which called for the ultimate expenditure of approximately \$103,000,000, without reference to or consent of Congress.

The power to construct such fuel depots lay in Congress and not in the Secretary of the Navy. The following sections of the United States Constitution are important, namely:

Article I, Section 1, which provides:—

“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

Article I, Section 8, Clause 13, which provides:—

“The Congress shall have power * * * to provide and maintain a Navy.”

Article I, Section 9, Clause 7, which provides:—

“No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all Public Money shall be published from time to time.”

Article IV, Section 3, Clause 2, which provides:—

“The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”

The power to establish depots of coal and other fuel was delegated by Congress to the Secretary of the Navy under the Act of August 31, 1842 (5 Stat. 577), which Act later became R. S. 1552. That Act reads in part:—

“The Secretary of the Navy may establish, at such places as he may deem necessary, suitable depots of coal and other fuel for the supply of steamships of war.”

But this delegation of power was subsequently revoked by Congress by the Act of March 4, 1913, (37 Stat. 898) which provides:—

“Section Fifteen Hundred and Fifty-two of the Revised Statutes of the United States authorizing the Secretary of the Navy to establish, at such places, as he may deem necessary, suitable depots for coal and other fuel for the supply of steamships of war, is hereby repealed.”

The House Committee on Naval Affairs on reporting the bill containing this repealing provision (House Report, 62nd Congress, 3rd Session), stated:—

“The Committee recommends the repeal of Section 1552, Revised Statutes, which authorizes the Secretary of the Navy to establish coal depots without the supervision of Congress as to where the depots are to be located. Heretofore a large amount of money has been expended to establish coaling

stations which have since been abandoned, and the Committee deems it necessary to repeal the Statute in the interest of economy. An appropriation of \$500,000. for 'depots for coal and other fuel' to complete authorizations heretofore made, is recommended."

From the foregoing statutes and provisions of the Constitution, it is clear that Congress, and Congress alone, was empowered to select the sites of fuel depots for the Navy and to authorize their construction. That the Navy Department so understood matters is evidenced not only by the fact that commencing in the year 1914 it requested Congress for authority to establish fuel depots at certain specified places at certain specified costs, but also by the long list of Appropriation Acts from 1914 onward, wherein the various fuel depot projects are specifically mentioned and a separate appropriation is made for each.

The following excerpt from the Act of March 3, 1915, c. 83 (38 Stat. 928, 937), is typical:—

"DEPOTS FOR COAL AND OTHER FUEL: For additional fuel oil storage at Melville, Rhode Island, \$40,000; additional fuel oil storage at Norfolk, Virginia, \$90,000; fuel oil storage at San Diego, California, \$40,000; fuel oil storage at Puget Sound, Washington, \$80,000; fuel oil storage at Mare Island, California, \$80,000; fuel oil storage at Guantanamo Bay, Cuba, \$50,000; fuel oil storage at Pearl Harbor, Hawaii, \$80,000; custody and care of Naval Petroleum Reserves, \$10,000; contingent \$30,000; in all \$500,000."

A list of such Appropriation Acts follows:—

March 4, 1913, c. 148, 37 Stat. 891, 898; June 30, 1914, c. 130, 38 Stat. 392, 401; March 3, 1915, c. 83, 38 Stat. 928, 937; August 29, 1916, c. 417, 39

Stat, 556, 570; March 4, 1917, c. 180, 39 Stat. 1168, 1179; June 15, 1917, c. 29, 40 Stat, 182, 207 (a War Deficiency Appropriation Act); July 1, 1918, c. 114, 40 Stat. 704, 726; November 4, 1918, c. 201, 40 Stat. 1020, 1034 (a War Deficiency Appropriation Act); July 11, 1919, c. 9, 41 Stat. 131, 145; June 4, 1920, c. 228, 41 Stat. 812, 822; June 5, 1920, c. 253, 41 Stat. 1015, 1030; July 12, 1921, c. 44, 42 Stat. 122, 130.

The stipulation as to the testimony of Admiral Parks and certain members of Congress (R. II-682-5) shows that appropriations were asked by the Navy Department for "fuel depots" at the very points where these "fuel depots" are to be erected under the Pan American and the Mammoth contracts and leases, and that the Congress failed to make the appropriations. It is noteworthy that the minute the above scheme of evasion was perfected, the Navy Department ceased to knock at the door of Congress for appropriations for reserve "fuel depots."

Admiral Robison,—a witness called by the Appellants, and the personal representative of the Secretary of the Navy in charge of Naval fuel matters,—admitted under cross examination that the Pearl Harbor project was an extraordinary performance, entirely out of the ordinary; that usually before starting such a project, the Navy asked Congress for an appropriation for a fuel depot to be erected at a particular place, but did not do it here; that because they feared trouble from Congress or some member thereof, they kept their silence (R. III-1061, 1074).

In addition, both Admiral Robison and Admiral Gregory (R. II-576; III-1082-3) testified that the Pearl Harbor project was but the first step in a fuel depot building plan, which had never been referred to Congress

and which called for the ultimate expenditure of approximately \$103,000,000 (R. II-545, 560; III-1103-4).

Counsel open their defense of the establishment of fuel depots under the contracts of April 25 and December 11, 1922, without the prior consent and approval of Congress, by referring to the repeal of R. S. 1552 by the Act of March 4, 1913; and then state that counsel for the Government are directing the attention of this Court to a situation where no statute at all existed, instead of a situation where an affirmative statute containing specific provisions exists (Appellants' brief, pp. 145-46). This contention overlooks the fact that upon the repeal of R. S. 1552, the exclusive authority to locate and establish fuel depots was re-vested in Congress by virtue of the above quoted sections of the Constitution. What stronger situation could there be than that fixed and determined, as here, by constitutional provisions?

Section 1552 would hardly have been passed if the Secretary of the Navy had power to establish fuel depots without it. If Congress intended in 1920 to re-vest him with this power, it would have been by terms definite and certain. It cannot be assumed that this power thus first conferred, and then taken away, would be re-vested in the Secretary of Navy by the confessedly uncertain language contained in the Act of June 4, 1920, whose primary purpose was the conservation of the reserves.

Appellants also argue (Appellants' brief, p. 145 ff.) that a fuel depot is coterminous in meaning with a navy yard or a naval station. Congress has always authorized fuel projects under the phrase "Depots for coal and other fuel." A glance at the appropriation acts will demonstrate this. It is the uncontradicted evidence in this case by those competent to speak

accurately and technically, that the Pearl Harbor projects covered by the contracts of April 25th and December 11th constituted complete fuel depots.

Admiral Robison, Chief of the Bureau of Engineering of the Navy and Admiral Gregory, Chief of the Bureau of Yards and Docks of the Navy, both of whom certainly ought to be competent to speak authoritatively, testified that the contracts called for the erection of complete fuel depots. (R. II-576; III-1082-3.) When the contracts were in contemplation, Admiral C. S. Williams, President of the War College and Director of War Plans of the Navy wrote of the scheme: " * * * it operates to create reserve fuel storage, the construction of which has not been specifically authorized by Congress." (R. III-1058.)

Compared with this expert opinion, we submit that counsel's labored attempt to prove the contrary is not convincing.

Counsel for the Appellants observe that if these new tanks, built, as they claim, as an addition to an existing fuel depot, could not have been constructed without the prior express approval of Congress as to their location, then the Secretary of the Navy could not even have used any part of the \$500,000 general appropriation contained in the Act of June 4, 1920, **for the construction of a storage tank at any place whatsoever**, etc. (Appellants' brief, p. 151.) Such an observation arises from the failure to recognize that a fuel depot is something more than a storage tank. If reference be had to page 240 of their brief, it will appear that a storage tank is but one of many integral parts of a fuel depot. It must be remembered that over one third of the cost of the contract of April 25th is traceable to those other integral parts such as wharfage, bunkering facilities, channel dredging, embankments, pipe lines, pumping

houses, and the like. It should be further remembered that both Admiral Gregory and Admiral Robison testified without contradiction that the storage facilities constructed under the instant contract constituted complete fuel depots; and in so denominating the Pearl Harbor storage facilities, they clearly had in mind the many integral parts of a fuel depot. In fact, Admiral Gregory had testified at length as to these non-tankage features of the Pearl Harbor project.

Nor does it matter, in our judgment, whether the transaction be construed into an enlargement costing millions of dollars, of an existing fuel depot, or the building of a brand new one. It is too plain for argument that where the sole power to establish a fuel depot, or, as Appellants prefer to style it, a naval station, lies in Congress, there is no power without Congressional action, in the Secretary of the Navy, to enlarge or rebuild such depot or station. To hold otherwise would be to subvert the whole theory upon which the division of powers in our Government rests. It would be to give to administrative officers a roving commission to purchase land and to erect structures thereon for the use of the Government without the consent of Congress for the operation.

Finally it matters not one whit whether these depots were desired for reserve fuel or for current use fuel. In either case they would be fuel depots.

4. The contracts of April 25 and December 11, 1922, were not made by advertisement and competitive bidding, as required by law.

(Points VI and VII, Appellants' brief, pp. 152 and 161.)

The contract of April 25, 1922, apart from the preferential right clause, was distinctly a contract for the procurement by the Navy Department of fuel (a supply)

and the building of tankage for said oil, which construction work certainly constituted the furnishing of supplies and of services other than personal services. We do not care whether the delivery of royalty crude oil from the naval reserves is to be treated as a sale of that oil to the Transport Company, or payment of that oil by the Government to the Transport Company, or whether the transaction be treated as the acquirement by the Government of fuel oil storage tankage by purchase or by exchange.

The Government contends for a narrower, the Appellants for a broader construction of the words "store" and "exchange" which are used in the Act of June 4, 1920. But whether the Court shall adopt the one or the other, or some different construction of these words, the true question is, does this act repeal or suspend the statutes relating to competitive bidding.

Clearly they are not expressly repealed or suspended. What language is there in this act which can be held to repeal by implication the competitive bidding statutes? What reason can be urged for such construction? Were not the dangers apprehended by Congress at the time these statutes were passed present when the Act of June 4, 1920 was adopted?

In any aspect of the situation R. S. 3709 applies to the situation. That statute is as follows:

"R. S. Sec. 3709; Act March 2, 1861, c. 84, Sec. 10, 12 Stat. 220; (Sec. 6174 Barnes Code, page 1492).

"All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by

the public exigency, the articles or services required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

It will be noted that the statute not only covers all purchases, but all contracts for supplies or services. Do the Appellants say that the statute does not cover exchange contracts? It does not say so. Its language could not be more inclusive. It was upon the statute books long before the Act of June 4, 1920, was passed. Why is it claimed that it does not apply to the procurement of fuel oil, or the procurement of storage by the Navy?

Appellants say that the Act of June 4, 1920, was a remedial statute. Let us for the purpose of the argument grant that this is so. Appellants' own argument is to the effect that it was to remedy the inability of the Navy to get the benefit of the royalty oil which was running from leases in naval reserves, and which, therefore, had to be sold for cash and the proceeds turned into the Treasury as miscellaneous receipts, thus depriving the Navy of the use of those proceeds unless and until Congress had appropriated the same. If that was the matter to be remedied the remedy certainly did not require that when the Navy procured fuel oil or storage tankage it should not be bound to get the best deal it could by public competition, but the Secretary be handed a roving commission to make private contracts for such things.

Do they rely on the use of the words "in his discretion" in the act? It will be noted that that phrase is applied to the words "conserve, develop, use and operate" the reserves and does not either in sense or by collocation apply to the power to "use, store, exchange or sell" the oil and gas products of the reserves. Let us con-

cede, however, that the use of the words "use, store, exchange or sell" gives the Secretary the discretion to do **any one of those things**. What is the necessity for saying that the grant of that discretion revoked a plain act of Congress which said to the Secretary that when he made contracts for the procurement of supplies or services other than personal services he must do so by competitive bidding? No argument that is not forced and strained can possibly torture the act of June 4, 1920, into a repealer of the general law applicable to contracts for supplies and services. R. S. 3709 has been repeatedly construed.

United States vs. Purcell Envelope Co., (1919), 249 U. S. 313, was an action for damages for breach by the United States of a contract for the purchase of envelopes. The Postmaster General advertised under R. S. 3709 for bids for furnishing stamped envelopes and newspaper wrappers for a period of four years beginning October 1, 1898. The envelope company submitted the lowest bid in answer to the advertisement, which bid was accepted. A contract in quadruplicate was sent to the envelope company for execution, was signed by it and returned to the department. The department never executed the contract and the succeeding Postmaster General cancelled the same. Upon learning that the Postmaster General intended to readvertise for proposals the envelope company brought an action to enjoin him from so doing. The bill was dismissed upon the ground that there was an adequate remedy at law. The department declared the existence of an emergency under R. S. 3709 and accepted the offer of another envelope company without competitive bidding, and entered into a contract in accordance therewith.

The Court of Claims rendered judgment for the envelope company. The Court of Claims (**51 Ct. Cls.**

211, 1916), in discussing the sufficiency of the advertisement, said (p. 214):

"This Court has held, except in certain cases of emergency, that all contracts between individuals and the Government are void, unless they are made upon advertisements for proposals previously published, and that a compliance with such statutes is a condition precedent, upon the performance of which only can a binding contract with the Government be made by its officers. **It acts by its public officers, and their powers and duties are prescribed and limited by laws which they must follow.**"

In affirming the judgment of the Court of Claims this Court held that the contract had been completed by the acceptance of the bid and that it was not necessary that it be formally executed by the Government, and that the succeeding Postmaster General had no discretion to revoke it. It was argued that the action of the Postmaster General was quasi-judicial and that he had the right to review and set aside the decision of his predecessor, since the contract was not consummated.

Mr. Justice McKenna held that the procedure under R. S. 3709 was mandatory and not permissive, in spite of the broad power of the Postmaster General, and that upon accepting the bid of the envelope company any discretion in the Postmaster General ceased (page 318).

"In the present case it is insisted his action is not so subordinate, that he has discretion, and when exercised, it is paramount, his action being 'quasi judicial,' the contract not having been consummated, and that, therefore, it was within his power to review and set aside the decision of his predecessor. We are unable to concede the fact or the power asserted to be dependent upon it. There must be a point of time at which discretion

is exhausted. The procedure for the advertising for bids for supplies or services to the Government would else be a mockery—a procedure, we may say, that is not permissive but required (Section 3709, Rev. Stats.). By it the Government is given the benefit of the competition of the market and each bidder is given the chance for a bargain. It is a provision, therefore, in the interest of both Government and bidder, necessarily giving rights to both and placing obligations on both."

United States vs. Ellicott, (1911), 223 U. S. 524.

This was a suit to recover damages from the United States for the abrogation of a contract. The Isthmian Canal Commission, by advertisement and specifications, invited proposals for six steel dump barges, and in response thereto the claimants submitted two bids, the second one of which changed the weight of the framing and the plates from that set forth in the specifications. The general purchasing officer for the Commission, after examining the bids, submitted a draft of contract to the claimants. After several changes a contract was executed and signed by both parties based upon the second bid. Subsequently the claimants submitted a list of materials to be used in the construction of the barges, and the Isthmian inspector then discovered that the barges which the claimants proposed to construct differed from the specifications and the circular letter inviting proposals. The Commission disapproved the list of materials and demanded that the claimants adhere to the original specifications. This the claimants refused to do and the contract was thereupon abrogated by the Commission. Suit was commenced in the Court of Claims and judgment was rendered against the United States for anticipated profits and gains.

Upon appeal to this Court it was argued by the Solicitor General that the contract was let under R. S. 3709 and that the Commission was without authority to enter into a contract for dump barges of a radically different type from those originally specified unless and except the Commission readvertised for proposals. **Counsel for the claimants contended, however, that there was no statute requiring the Isthmian Canal Commission to advertise for bids and to award the contract to the lowest responsible bidder.**

In other words, the claim was there, just as it is here made, that the Canal Act superseded the general law on the subject of competitive bidding. This Court reversed the judgment of the Court of Claims and held that there was no valid contract, for the reason, *inter alia*, that it had been let without competitive bidding.

Chief Justice White delivered the opinion of the Court, and in discussing the question of readvertisement said (pp. 542-3):

“This result of the absolutely antagonistic and destructive character of essential provisions of the contract, one upon the other, can only be escaped by indulging in one of two hypotheses, either that the terms of the advertisement and specifications as incorporated in the assumed contract overshadowed and virtually destroyed the proposals resulting from the bid of the claimant, which also was incorporated in the contract, or conversely that the proposals which the bid embraced had the effect of setting at naught the provisions of the specifications. But if the first assumption were indulged in, it would clearly result that there was no right to recover, since that right is based upon the theory that the specifications are not binding and need not be complied with; and if the second were indulged, the same result would follow, since it would then come to

pass that the contract was so irresponsible to and destructive of the advertised proposals as to nullify them, **and therefore cause it to result that the contract was one made without the competitive bidding which was necessary to give it validity."**

Nothing can be clearer than that there was not even competition, let alone advertisement for the contract of December 11, 1922. Nothing can be clearer than that although there was a sort of illusory competition for the contract of April 25, 1922, there was no advertisement, and in essence there was no competition. We shall not burden the Court with any lengthy argument to demonstrate that the award of the contract of April 25, 1922, did not conform to the law as to competitive bidding, leaving out of account entirely the fact that there was no advertisement. We have above quoted quite fully from *United States vs. Ellicott* and that case is a full authority that where a contract is let on different terms than those contained in the advertised proposal, such letting is destructive of competitive bidding and violates the act. Again and again it has been held that any material departure in the contract awarded from the terms and conditions under which the bidding is had renders the contract in a sense a private one, opens the door to favoritism and to the defeat of that which the law intended to safeguard in requiring contracts to be let upon bids and after advertisement.

Inge vs. Mobile (1902), 135 Ala. 187.

Wickwire vs. Elkhart (1895), 144 Ind. 305.

Shaw vs. Trenton (1887), 49 N. J. L. 339.

Chippewa Bridge Co. vs. Durand (1904), 122 Wis. 85.

People vs. Board of Improvement (1870), 43 N. Y. 227.

Mazet vs. Pittsburgh (1890), 137 Pa. 548.

A number of the above cases are authority for the proposition that where alternatives in the bidding are

permitted such permission of alternatives must clearly define the nature of the alternatives. Otherwise the bidders are not on an equal basis. As we have above pointed out, the invitations for proposals for the first Pearl Harbor job did permit certain alternatives which were clearly defined and of which some of the parties availed themselves, but there was no suggestion that an alternative proposal would be entertained which involved a preferential right to future leases in Naval Reserve No. 1. This is entirely apart from the other proposition of the fraud which entered into the making of the contract of April 25, 1922, on the basis of which the Court found that the officials most nearly concerned with the making of that contract knew that there would not be any real competition before the bids were opened. That, however, goes to an entirely different point. That might have been true even if the proposals were advertised and bids submitted pursuant to the advertisement. What we are now arguing is that as a matter of law the Navy Department was required to advertise for proposals and to permit all bidders to bid on an equal and even basis without unspecified alternative bids and to award the contract only on bids that conformed to the invitations. In all these respects the awarding of the contract of April 25, 1922, was wholly without authority of law and in the teeth of express statutory provision. There was no advertisement and not even a pretense of competition for the December 11th contract. Plainly, therefore, the United States is bound by neither of them, and no rights of any kind can flow from them in favor of the Appellants.

In the Courts below Appellants strenuously contended that the contract of April 25, 1922, was in fact

let upon competitive bidding, and that as the contract of December 11, 1922, was merely "supplementary" thereto it was not required to be so let. These untenable positions they have now wholly abandoned. They have substituted two others equally untenable.

The first is that an "exchange contract" cannot be let by competitive bidding. (Appellants' brief, p. 152.) This is merely to deny the obvious facts. If one has a quantity of a commodity which he wishes to exchange for various other commodities he can frame an invitation whereby the bidder will tell him how much (in units—or in bulk) of that commodity the bidder will require as payment for what he proposes to furnish. Moreover, the impassable difficulty which Appellants now perceive is of recent creation. It apparently was not sensed when the invitations to bidders for the contract of April 25, 1922, were issued. Competition, it is true, was absent in the bidding for that contract, but merely because of favoritism and the acceptance of alternative bids not contemplated by the invitation for bids. But true competition could have been secured.

The second position now taken is that R. S. Sec. 3728 which gives the Secretary of the Navy power in purchasing fuel "to discriminate and purchase, in such manner as he may deem proper, *that kind of fuel which is best adapted for the purpose for which it is to be used,*" does away with the necessity for purchasing fuel by competitive bidding. (Appellants' brief, p. 153.) The argument is seriously made that this discretion given to select one kind of fuel rather than another gives the Secretary the right to purchase that kind from one seller by private negotiation without advertisement or competition. The argument answers itself.

5. The Act of June 4, 1920, did not repeal or supersede prior general statutes on fuel depots, competitive bidding, Government contracts, and the sale of Government property.

Appellants contend that the statutes we quoted on the subjects mentioned, have no application to the contracts of April 25 and December 11, 1922. They are chary of claiming that the Act of June 4, 1920 "repealed" those earlier and general statutes by implication. We are not sure that they would even aver that the Act of June 4, 1920 "superseded" these earlier general statutes. They apparently attempt to evade the applicability of the several statutes by an argument that the Act of June 4, 1920 is a special act, and as such is complete in itself, and that the actions of the Secretary of the Navy thereunder are not limited by any general legislation whatever applicable to any acts or conduct which he may be called upon to perform under the Act of June 4, 1920.

However the matter is expressed, we contend that these general statutes are applicable. Unless the Act of June 4, 1920 in some way affected these prior statutes, those statutes are the law of this case. They are on the statute books; they are pertinent, and in and of themselves they admit of no exception within which this case falls.

The argument that they are inapplicable to this case can be predicated only upon some principle of nullification of a prior statute by a later statute. This is usually denominated a repeal, either total or partial. If instead of using the term "partially repealed" the term "superseded" is preferred, we have no quarrel with the terminology, provided it is clearly perceived that the effect is the same, namely, a *pro tanto* nullification of a prior statute by a later one.

We are familiar with nullification by express repeal. We are also familiar with the principle that where there is a repugnancy of terms, or an inconsistency between earlier

and later statutory provisions, the latter provision prevails over the former. There is no question of express repeal in this case. We understand the principle of statutory construction to be then, that the earlier statutes are not affected by any later enactment unless repugnancy or inconsistency exists.

Wherein is the Act of June 4, 1920, inconsistent with the earlier statutes herein referred to? In the Act of June 4, 1920, we find no mention whatsoever of fuel depots. They simply are not there. There is nothing either positive or negative about them. Moreover, we find nothing in the Act of June 4, 1920, that is inconsistent with R. S. 3709 requiring advertising and competitive bidding in the letting of Government contracts. We search the Act of June 4, 1920, in vain for anything inconsistent with the statutes forbidding the making of contracts to bind the Government beyond the amount appropriated therefor, unless otherwise specifically provided, or anything inconsistent with the statutes that make it obligatory to turn into the Treasury all proceeds of sales of Government property.

In truth, there is no inconsistency. There is no need to invoke the principles of statutory construction. There is nothing to construe, because all of the acts harmonize and fit together.

The very reason for the enactment of a general statute requiring advertising and competitive bidding for Government contracts is to insure those things being done **in all cases**. Such a general statute finds its utility in those instances where the authorization of a particular contract is silent on the subject. If Congress authorizes a building to be put up, or certain materials to be contracted for, R. S. 3709 provides how the contract is to be entered into. The same observations are pertinent with regard to the statutes about fuel depots, and other statutes herein referred to governing Government contracts and the sale of Government property.

**Great Northern Ry. Co. vs. United States,
(1908), 208 U. S. 452.**

This Court was called upon to determine the effect of Section 13 of the Revised Statutes upon later provisions of the Hepburn Act. Section 13 of the Revised Statutes prescribes general rules which are to govern particular cases as they arise. In stating the opinion of the Court, Justice, later Chief Justice, White, said at page 465:

"As the section of the Revised Statutes in question has only the force of a statute, its provisions can not justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. **But while this is true the provisions of Section 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13.**"

The decision in the case was to the effect that full force should be given to Section 13, there being nothing necessarily to the contrary in the later statute.

**Erie Coal & Coke Corp. vs. United States,
(1925), 266 U. S. 518.**

The Secretary of War had entered into negotiations to sell surplus supplies as authorized by the Act of July 11, 1919. That Act authorized the Secretary of War to sell "upon such terms as may be deemed best." A proposal was submitted after advertisement to the Secretary of War, but he refused to enter into a written contract upon the basis of the pro-

posals received. R. S. 3744 required all Government contracts made by the Secretary of War to be in writing.

The close analogy of this case arises from the fact that the Act of July 11, 1919, was special in its scope and subject matter, because it applied only to the sale of surplus war supplies. The act also purported to vest discretion in the Secretary of War. Nevertheless this Court held that the Act of July 11, 1919, did not in any way modify the earlier general statute. Mr. Justice Butler speaking for the Court, stated at page 521:

"Moreover, Sec. 3744, Revised Statutes, required the Secretary of War to cause every contract made by him, or by officers under him appointed to make contracts, 'to be reduced to writing, and signed by the contracting parties with their names at the end thereof.' The Act of July 11, 1919 authorizing the Secretary to sell surplus war supplies, is not inconsistent with that section and does not repeal or modify it. There is no reason why it should not apply to contracts made in pursuance of the later act. It must be held that, because of the failure to make and sign a written contract as required by Sec. 3744, the United States was not bound."

United States vs. Barnes, (1911), 222 U. S. 513.

The question arose as to whether a later statutory enactment of restricted scope and subject matter modified, superseded or prevented the application of earlier general statutes. In holding that it did not the Court said, at page 520:

"Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it

an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears."

See also:

- Robertson vs. Railroad Labor Board**, (1925), 268 U. S. 619;
In re: East River Co., (1924), 266 U. S. 355, 367;
United States vs. Sweet, (1917), 245 U. S. 563;
Panama R. R. Co. vs. Johnson, (1924), 264 U. S. 375;
United States vs. Greathouse, (1896), 166 U. S. 601, 605;
Ex Parte Webb, (1911), 225 U. S. 663, 690;
Washington vs. Miller, (1914), 235 U. S. 422;
Bookbinder vs. United States, (1923), 287 Fed. 790, (C. C. A. 3),
 (*Certiorari denied* 262 U. S. 748);
Witte vs. Shelton, (1917), 240 Fed. 265, (C. A. 8),
 (*Certiorari denied* 244 U. S. 660).

The reasoning of the Appellants on this subject is indeed strained. They first attribute a sweeping scope to the Act of June 4, 1920. They would have this Court enter the realm of judicial legislation and hang a whole legislative code upon one or two words. Then they would have the Court, after attributing great breadth and generality to the provisions of the Act of June 4, 1920, call it a special act, and find it inconsistent with earlier general acts. As we have pointed out, the alleged inconsistency is a figment of the imagination. The earlier acts and the Act of June 4, 1920, are completely harmonious. The Chief Justice has pointed out the fallacy of this argument in the recent case of

United States vs. Noce, (1925), 268 U. S. 613.

In that case an Army officer claimed longevity pay on the basis of his services as a cadet at the United States Military Academy. He relied upon a proviso of the Act of 1920:

"That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey, shall be based on the total of all service in any or all of said services."

Earlier Acts of 1912 and 1913 had provided that services at the Military or Naval Academy should not be counted in computing longevity pay. At page 618 the Chief Justice said:

"It is, indeed, very difficult to say that there is any real inconsistency between the proviso of 1920 and the Acts of 1912 and 1913. It is supposed to be shown in the use of the words 'any or all the services,' and it is said that as 'any' may mean one or more, it may apply to the Army alone, and can only be satisfied by making it apply to the total service in the Army alone, and must therefore mean service in the Army as construed by this court in the Morton Case and the Watson Case, in which it was held that under then-existing legislation, service in the Military Academy was service in the Army. **This, it seems to us, is a strained method of first finding an inconsistency by no means clear, if it exists at all, and then erecting it into an implied repeal. Implied repeals are not favored.** United States v. Greathouse, 166 U. S. 601, 605; Frost v. Wenie, 157 U. S. 46, 58; United States v. Yuginovich, 256 U. S. 450, 463."

The very cases upon which Appellants rely (pp. 157-158) are examples of the rule that statutes should be harmonized where this is possible.

6. The provisions of the contracts and leases constituted an illegal attempt to delegate the power conferred upon the Secretary of the Navy by the Act of June 4, 1920.

(Point X, Appellants' brief, p. 244.)

(a) The Executive order of May 31, 1921.

The Trial Court held that the Executive order, so far as it attempted to transfer the administration of the reserves to the Secretary of the Interior and pass over to him discretionary powers vested in the Secretary of the Navy, was void and of no effect. We understand that counsel for Appellants concur in this view. If, therefore, purporting to act under the Executive order, Secretary Fall had made contracts and leases in an attempt to do the very things entrusted to the Secretary of the Navy by the Act of June 4, 1920, his acts would have been void. Anyone dealing with him would have been on notice of his utter lack of power, and the contract taken from him and containing his signature would have been of no more value than a worthless piece of paper.

Having in mind that the President of the United States had no power to transfer the administration of the naval reserves from the Navy Department, where Congress, the custodian of the public lands, had placed it, into the Interior Department, where Congress had not placed it, let us see what situation arises as a result of the contracts made.

It will, we suppose, be admitted that the "use, storage, sale or exchange" of naval royalty oils and the leasing of lands in the naval reserves was committed solely to the Secretary of the Navy by the Act of June 4, 1920. We suppose it will not be denied that the duty and function of contracting for fuel oil for the Navy and for construction of wharves, docks, tanks, etc., constituting a fuel depot, belongs exclusively to the Secretary of the Navy. We suppose

that no contractor would be aided by a court to enforce his contract if he made a contract for fuel oil for the Navy or for storage facilities for naval oil, with the Secretary of State or the Secretary of Commerce. The court, we take it, would simply say that no contract existed.

We assume that the Appellants would not argue in such a case that the action of the Secretary of State or the Secretary of Commerce **estops** the United States to denounce the contract, to refuse performance of it, and if any moneys or property of value of the United States had passed into the possession of the contractor, to prevent the United States from recovering its property.

As we will demonstrate, this is the exact situation in this case.

(b) *Delegation of powers under the contract of April 25, 1922.*

By the contract of April 25, 1922 (Exhibit B of the bill, R. I-26) the Secretary of the Navy, a party to that contract, by solemn covenant purported to transfer the procurement of fuel oil and of storage tankage therefor, dredging, docking, etc., at the Pearl Harbor Naval Station to the Secretary of the Interior. He further purported by that contract to transfer the entire administration over half of Naval Reserve No. 1 and its leasing to the Secretary of the Interior.

In order that there may be no misunderstanding of our position, let us say that we definitely assert that the Secretary of the Navy did not turn over to the Secretary of the Interior ministerial powers. He put the Secretary of the Interior in the position of the contracting party, of one with absolute and complete power over the subject matter. Let us see if this statement is true.

By Article I (R. I-28) the Government agrees to accept as the penal bond required, the personal bond of Mr. Edward L. Doheny in the sum of \$250,000 but reserves the right to call

later for a corporate bond **“when and if in the judgment of the Secretary of the Interior such bond shall be deemed necessary or advisable, * * *.”** Since when did the Secretary of one department acquire the power to leave it to the Secretary of another department to say what sort of security should be given by a contractor with the first named department?

By Article V (R. I-31) it is provided that if the production from the leases heretofore granted or hereafter granted in reserves Nos. 1 and 2 “decrease to such an extent that the time of this contract shall be unduly prolonged, then the Government will, **in the discretion of the Secretary of the Interior, grant additional leases on such lands as he may designate in naval petroleum reserve No. 1 as shall be sufficient to maintain total deliveries of royalty oil under this contract at the approximate rate of five hundred thousand barrels (500,000) per annum**”; so that the Secretary of the Interior by this clause obtains the sole power to determine the rate at which the consideration shall be paid to the contractor.

By Article XI (R. I-34) it is provided that if during the life of this contract future leases shall be granted by the Government within that portion of reserve No. 1 situated in Townships 30 and 31 south, range 24 east, Mount Diablo base and meridian, **“the contractor shall first be called upon by the Secretary of the Interior to meet such drilling conditions and to pay such royalties as the Secretary may deem just and proper, and in the event of his acceptance of such conditions and of his agreement to pay such royalties, the contractor shall be granted by the Government a preferential lease on such tracts as the Secretary of the Interior may decide to lease. In the event of the failure of the contractor to agree to the conditions and royalties as proposed by the Secretary of the Interior, then said lease or leases may be**

offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in said bidding." By this clause the Secretary of the Navy absolutely and completely surrenders all power over the territory mentioned to the Secretary of the Interior and deprives himself of the exercise of any discretion as to the amount to be leased or the terms of the leasing.

By Article XII (R. I-35) it is provided that if the contractor completes the construction of storage facilities for less than 3,197,086 barrels of "basic" crude oil the contractor will give the Government the benefit of the saving **"as determined by agreement between the contractor and the Secretary of the Interior by crediting such saving in barrels of basic crude oil on account of the proposal sum."** By this clause the Secretary of the Navy surrenders absolutely the right to determine the cost of the naval structures to be constructed and vests that power in the Secretary of the Interior.

By the terms of this contract the specifications are made a part of it. See Article I (R. I-27). These specifications were offered in evidence as Pl. Ex. 126, and so far as material are summarized in the Record at page 425. The provisions which are important are as follows:

The paragraph numbers refer to the paragraphs of the specifications as they appear in Plaintiff's Exhibit 126 (R. I-425ff).

Par. 12 Before commencing installation of any work the contractor shall submit to the Secretary of the Interior for approval drawings showing complete details of all reinforced concrete, pump installations, shop details of tanks, etc.

Par. 132 Details of the foam fire protection system to be installed by the contractor shall first be submitted to and approved by the Secretary of the Interior before such installation.

- Par. 210 The successful bidder will be the party of the first part to the contract and will be known as the contractor, **and the Secretary of the Interior will be the party of the second part and known as the Government.**
- Par. 215 The work will be under the general direction of the Secretary of the Interior * * * appeals may be made to the Secretary of the Interior.
- Par. 225 Applications for extension of time on the part of the contractor must be made to the Secretary of the Interior through the officer in charge and the contractor agrees to accept the decision of the Secretary of the Interior as binding.
- Par. 227 In ascertaining liquidated damages which the contractor must forfeit by reason of delays, the Secretary of the Interior will determine what delays in the receipt of materials by the contract were unavoidable and therefore excused. A certified copy of the contractor's record of orders for materials must be made available to the Secretary of the Interior in determining the above question.
- Par. 229 The Secretary of the Interior may declare the contract null and void if it evidently cannot be completed within the prescribed time, or if the contractor commits a breach thereof. If the contract is annulled a board of U. S. officers shall determine the value of the work done by the contractor, plus a reasonable profit allowable thereon. The Secretary of the Interior has the right to approve such findings and to approve the inventory which the board shall prepare of materials, tools, etc., belonging to the contractor, which said findings and inventory when so approved will be conclusive in an accounting between the parties. If the work is thereafter completed by the Government, the cost of completing same shall be determined, and when approved by the Secretary of the Interior shall also be binding upon the parties.
- Par. 230 The Government reserves the right to make changes in the plans, specifications and contracts, and the cost of such changes when approved by the

Secretary of the Interior shall be added to or deducted from the contract price. The contractor agrees to proceed with such changes as directed in writing by the Secretary of the Interior.

- Par. 231 The contractor's claims for extras will be referred to the Secretary of the Interior for approval and the finding of the secretary shall be conclusive.
- Par. 236 Any violation of the eight-hour day law coming to the notice of Government officers will be reported to the Department of the Interior for such legal action as may appear warranted.
- Par. 237 Special or detailed plans, whenever it is necessary for the contractor to prepare them, must be submitted to the officer in charge or to the Secretary of the Interior, as may be directed, for approval.
- Par. 241 If conditions at the site of the work are discovered to be different from the plans and specifications, a report shall be made to the Secretary of the Interior, who will determine whether a change in the contract price is to be made. If made, it will be adjusted as per paragraph 230.
- Par. 255 Before the first payment is due the contractor must furnish to the officer in charge a schedule of prices of materials. This will be forwarded to the Secretary of the Interior and after his approval will govern the preparation of monthly estimates.
- Par. 256 Monthly vouchers covering all work done and materials furnished during the month shall be prepared by the officer in charge, certified by the contractor, and "forwarded to the Secretary of the Interior for approval and for crediting on account toward the delivery of the proper amount of oil in accordance with the terms of the exchange." The final payment shall not be made until the contractor shall deliver a release of all claims against the Government in such form as shall be approved by the Secretary of the Interior.
- Par. 258 The contractor shall furnish to the officer in charge, for the information of the Secretary of the Interior, statements showing the substance of all subcontracts.

- Par. 259 Bids must be accompanied by certified checks payable to the Secretary of the Interior as a guarantee that the bidder will not withdraw his bid except with the approval of the Secretary of the Interior, and that if successful he will execute a contract and give bond satisfactory to the Secretary of the Interior, and will return the same to the Secretary of the Interior within ten days after forms are furnished to him.
- Par. 265 Prospective bidders are requested to report to the Secretary of the Interior for correction or interpretation before the date of opening of bids, any errors or omissions which they observe in the drawings and specifications.

If anything more were needed to convince that the Secretary of the Navy laid down every power in him vested by law, these provisions of the specifications would seem to be conclusive. The Secretary of the Interior is even made by the contract the party of the second part and known as the "Government." Wherever, therefore, in the contract or in Proposal B on which it was based, and which is copied at R. I-36, the word "Government" appears in any matter of covenant with the Government, the words "Secretary of the Interior" must be read in place of the words "the Government," and it thus appears that Secretary Fall was, by the contract, given all power of every kind. Under this all-inclusive clause Secretary Fall had all and every power, but lest there should be any mistake about the matter, every conceivable thing which an owner, acting in his own right, would desire by contract to reserve to himself by way of discretion or power, is, by the clauses of the specifications, reserved not to the Navy Department, not to Secretary Denby, but to Secretary Fall.

(c) *Delegation of powers under the contract and lease of December 11, 1922.*

At the trial we heard much from Appellants of the argument that this contract was merely a "supplementary" con-

tract to the contract of April 25, 1922. Now we learn from Appellants' brief that it is a brand new contract. It is interesting, however, in the light of this averment, to read its preambles. They appear on page 41 of the Record.

The first of them recites the contract of April 25, 1922.

The second recites the desire to fill the tanks under construction and to procure additional amounts of fuel oil in storage at Pearl Harbor and that the Secretary of the Navy **"has requested the Secretary of the Interior as administrator of the naval petroleum reserves to arrange for such additional fuel oil and other petroleum products in storage * * *"**

At the middle of page 42 of the Record this recital appears, **"And, whereas under the terms of said contract of April 25, 1922, contractor is granted preferential right to leases to certain lands in naval reserve No. 1 on such terms and conditions as may be determined by the Secretary of the Interior."**

Let us now inquire what it is the contractor agrees to do. We find in paragraph 1 of the contract (R. I-43): "Provide the fuel oil required to be furnished under said contract of April 25, 1922, and to fill the storage tanks therein called for when and as directed by the **Secretary of the Interior.**" The contractor then goes on to covenant to construct fuel oil storage and furnish certain storage for fuel oil in its own tanks, and to sell the Navy certain products; and the Government on its part agrees to deliver its royalty oils to the contractor in payment for the things the contractor is to do and to continue to deliver such oils for a period of fifteen years, payment by the contractor to be by delivery of fuel oil, petroleum products, construction of additional storage facilities, or in cash, as the Government may at the time elect. The Government then agrees to make the lease to the unleased portions of Reserve No. 1. The specifications attached to this contract provide *inter alia* as follows:

"States that the specifications which form a part of the contract No. 4800 are prepared by the Chief of the Bureau of Yards and Docks 'under authority of the Acting Secretary of the Interior as given in his letter dated May 5, 1922 * * *.'" (R. I-429.)

It may be well in this connection to call the Court's attention to the terms of the letter of May 5, 1922, (Pl. Ex. 129) mentioned in the specifications. It is copied in Volume I of the Record at page 433, and reads in part as follows:

"The Department of the Interior shall retain direct control of the oil business involved in this contract; in other words, of the first part of the contract mentioned above.

"The Chief of the Bureau of Yards and Docks, Navy Department, Admiral L. E. Gregory, is designated as the representative of the Secretary of the Interior in handling the second part of the contract as noted above. This involves, first, all technical matters in connection with the plans and specifications for storage, and which in its general phases can be most expeditiously handled in Washington; second, the supervision of construction work in the field at Pearl Harbor; and third, the receiving of the oil at Pearl Harbor from the tankers and placing same in tank storage as it becomes available under this contract until such time as the completed plant shall be turned over to the Government.

"The Secretary of the Interior expressly reserves at all times the right to recall the foregoing representative and to designate a successor from the Navy Department as his representative. The right of the contractor to appeal to the Secretary of the Interior, as provided in the contract, is not affected hereby. Notice of any appeal by the contractor from the decision of the officer in charge of the work and the reasons therefor shall be forwarded promptly, being routed through the commandant and the Chief of the Bureau of Yards and Docks on their way to the Secretary of the Interior."

The specifications further contain the following provisions:
(R. I-429ff.)

"Before installing any work the contractor shall submit to the Secretary of the Interior for approval drawings showing complete details of all reinforced concrete, pump installations,' etc.

"Work shall be under the general direction of the Secretary of the Interior. Appeals may be made to the Secretary of the Interior.

"Applications by the contractor for extensions of time are to be transmitted by the officer in charge to the Secretary of the Interior for action. Failure of the contractor to submit such applications within thirty days of the happening of a cause of delay may be construed by the Secretary of the Interior as a waiver by the contractor of his right to an extension. Decisions of the Secretary of the Interior on applications are to be conclusive.

"In ascertaining liquidated damages for delays, the secretary will determine what delays in the receipt of materials by the contractor were unavoidable and therefore excused. A copy of the contractor's records of orders for materials must be made available to the Secretary of the Interior.

"The Government reserves the right to make changes in the contract, etc., and the contractor agrees to proceed with same as directed in writing by the Secretary of the Interior.

"Violations of the eight-hour day law are to be reported to the Department of the Interior for such legal action as may be deemed warranted.

"Whenever it is necessary to prepare special or detailed plans, copies of same must be submitted for approval to the officer in charge or to the Secretary of the Interior, as may be directed.

"If changed conditions are encountered during the work, a report of same will be submitted by the officer in charge through official channels to the Secretary of the Interior, 'who will decide what changes are to be made.'

"Before the first payment is due the contractor must furnish to the officer in charge a schedule of prices for all work covered by lump sum subcontracts. This will be forwarded to the Secretary of the Interior, and after his approval will govern preparation of monthly estimates.

"As soon as the contractor has executed any subcontracts he shall furnish a statement showing substance of same to the officer in charge for the information of the Secretary of the Interior."

Appellants make reference on page 246 of their brief to the admission made by counsel for the plaintiff in the Mammoth Oil case, that the delegation of the right to consent to an assignment or a termination of the lease involved in that case, which delegation conferred said right upon Secretary Fall, did not necessarily render that lease void, but could be severed therefrom. From this admission counsel for Appellants infer that the duties involved in that delegation were regarded by us as non-discretionary. They then proceed to argue that it must follow that the various delegations of authority contained in the contracts herein involved were also non-discretionary and subject to be delegated. This argument entirely overlooks the fact that the admission made in the Mammoth case was not based in any way upon the discretionary character of the duties therein involved, but was based upon the principle that a provision in such an instrument inserted for the benefit of the lessee might, if found to be illegal, be stricken from the instrument without destroying its integrity.

We think it a fair statement from the above that no power of any kind is left in the Secretary of the Navy. He obviously cannot exercise powers of an owner towards the contractor doing work for such owner.

It will not do to suggest that what was transferred to the Secretary of the Interior were **ministerial duties**. It will not do to say that the Secretary of the Navy had to depend on somebody to look after the details of matters in his de-

partment and that he might just as well delegate the attention of these details to the Secretary of another department as to some one of his subordinates.

The answer is two-fold. In the first place the matters delegated to Secretary Fall by these contracts are not mere details. They constitute every reserved right and power that one of the contracting parties has. It is not merely the making of Secretary Fall an umpire or a referee in case of dispute. **It is making him, in effect, the owner and the contracting party.**

How easy it seems to counsel for Appellants airily to remark with a wave of the hand that the Appellants either did waive or would have waived all these illegal provisions; and that having gone ahead under these totally unauthorized and illegal contracts and placed property and done labor upon the lands of the United States it is too late for the Court to declare a rescission of the contracts **and that the United States is in effect estopped to have these contracts rescinded because forsooth they have been executed.** We submit that that is not the law.

(d) *The authorities.*

Filor vs. United States, (1869), 76 U. S. 45.

"The agreement or lease was, so far as the government is concerned, the work of strangers" (p. 48).

"The officers at Key West did not represent the United States, except in their military capacity, though assuming to do so. In signing the agreement, and in taking possession of the premises claimed by the petitioners they acted on their own responsibility. **Their unauthorized acts cannot estop the government from insisting upon their invalidity, however beneficial they may have proved to the United States.** If the petitioners are entitled to compensation for the use of the property they must seek it from Congress. The Court of Claims can award them none." (P. 49.)

Utah Power & Light Co. vs. United States, (1916), 243 U. S. 389.

"Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." (P. 408.)

"A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it." (P. 409.)

To the same effect:

Chanslor-Canfield Co. vs. United States,
(1920), 266 Fed. 145 (C. C. A. 9);
Jeems Bayou Club vs. United States, (1922),
260 U. S. 561.

(e) *There is no power to delegate.*

That there is no power in an official, in whom discretionary powers have been vested by law, to delegate them is well settled. That he cannot by contract lay them down or vest them in another is equally well established.

Mechem—Public Officers; Sec. 567:

"Judgment and Discretion can not be delegated.

It is a well settled rule in the case of private agents that where the execution of the trust requires upon the part of the agent the exercise of judgment or discretion its performance can not, in the absence of express or implied authority, be delegated to another. In such case it is presumed that the agent was selected because his principal desired and relied upon the agent's personal judgment and discretion, and unless authority to delegate it be expressly or impliedly given, the agent can not entrust the performance to another to whom the principal may be perhaps a stranger, and in whom he might not be willing to confide.

"This rule applies also to public officers. In those cases in which the proper execution of the office re-

quires on the part of the officer the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and unless power to substitute another in his place has been given to him he cannot delegate his duties to another. * * *

Sec. 568—**Mechanical or ministerial duties may be delegated.** Where, however, the question arises in regard to an act which is of a purely mechanical, ministerial or executive nature, a different rule applies. It can ordinarily make no difference to anyone by whom the mere physical act is performed **when its performance has been guided by the judgment or discretion of the person chosen.** The rule, therefore, is that the performance of duties of this nature, may, unless expressly prohibited, be properly delegated to another. Where, however, the law expressly requires the act to be performed by the officer in person, it cannot, though ministerial, be delegated to another. * * *

See: **San Francisco Gas Light Co. vs. Dunn**, (1882), 62 Cal. 580;

Brummett vs. Ogden W. W. Co., (1908), 33 Utah 285;

Oakland vs. Carpentier, (1859), 13 Cal. 540;

Mann vs. Richardson, (1873), 66 Ill. 481;

Mullarky vs. Cedar Falls, (1865), 19 Iowa 21;

Clark vs. Washington, (1827), 12 Wheat. 40;

People vs. Clean Street Co., (1907), 225 Ill. 470.

Appellants' counsel seem to concede these propositions of law, but to endeavor to escape them, by raising an estoppel against the Government, or by seeking to shred off the illegal provisions.

(f) *The authorities cited by Appellants.*

We have no quarrel with the authorities cited by Appellants at page 247 of their brief, on the question of delegation of authority. Appellants, however, contend that the

rule to be derived therefrom is "ministerial and executive duties may be delegated," and for this so-called rule rely primarily upon the case of *Cass County vs. Gibson*, 107 Fed. 363, and 7 Amer. & Eng. Encl. Law (2nd Ed.) 988. They fail to state the rule as qualified in the two foregoing authorities. We quote it here in full, italicizing the qualification which they omit:

" * * * But the usual limitation to the rule against the delegation of power obtains, and the board may delegate purely ministerial and executive duties, *the discharge of which does not call for the exercise of reason or discretion.*" (P. 369.)

At page 252 and following, Appellants cite certain authorities for the proposition that where a part of a contract is *ultra vires* the officer who made it, the other party to the contract, if the contract be divisible, may waive the *ultra vires* portion of it and call for performance of the balance. **What part, may we ask, of the contract of April 25th might the Transport Company have waived and called for performance of the balance?** We presume it would have had to waive the fact that the Secretary of the Interior was to all intents and purposes the Government under that contract. We presume it would have had to waive its preferential right. We presume it would have had to waive all the provisions in the specifications that **were intended not for its protection but for the protection of the Government.** A fine sight indeed to observe it waiving these things which bound it and were not for its benefit. We presume it would have waived the provision with regard to the bond it was to give. What, we ask, would be left of the contract? The same considerations apply to the contract of December 11, 1922.

But there is another answer to Appellants' authorities. It is this. Not a case cited by them deals with an unauthorized and illegal contract made by an officer of the

United States. Not a case cited by them touches the question whether a contract has any validity or existence at all which purports to vest discretionary administrative governmental functions in an officer other than the officer designated by act of Congress to deal with the subject-matter. The truth is that when the scope of the delegation of authority of the contracts of April 25 and December 11, 1922, is seen they are not in any proper sense of the word *ultra vires* contracts at all. They are contracts contrary to public policy, violative of the expressed will of the legislative branch of the Government and on their face utterly null and void.

Assume for a moment that the position asserted by the Appellants were to be accepted by this Court. The result would be this: If an officer wholly unauthorized to contract for the Government because the subject matter had by Congress been committed to some other department, made a contract and if that contract had been performed, or if the contractor could insist that the Government had come to no harm by it, the United States would be helpless to denounce the contract and vindicate its rights. We should soon have a situation where unauthorized Government officials were making contracts right and left, the contractors were hurrying them through to performance and the Government would stand helpless to stop the matter. This cannot be the law and Appellants do not cite a single case in support of their contention. The probability is that there are no cases in the books dealing with such a situation because we conceive that nobody has ever before had the hardihood to suggest this form of estoppel of the United States Government by the unlawful acts of its officials. The Trial Court held, and properly held, that these contracts were absolutely null and void. It held, and properly held, that the leases of June 5th and December 11th were made pursuant to these contracts and were inextricably tied up with them; that it would not do to strike down the contracts and leave the leases standing,

for such was never the intent of either of the parties to the contracts and it is too evident to require argument that the Court will not rewrite the contracts so as to give the Government something different from what its officers provided in the contracts. If it strikes them down it must strike them all down. If it sustains any of them it must sustain them all.

Counsel for Appellants, on pages 245ff. of their brief, attempt to dispose of this whole question of delegation of powers by an argument upon the alleged facts. It is argued that in fact the powers delegated by the contract of April 25th were not used; that, as concerns the construction of the storage plant at Pearl Harbor, naval officers (although nominally under the control of the Secretary of the Interior), in fact supervised the work; that as concerns the making of the lease of December 11, 1922, that lease was not made by Fall, or its making influenced or participated in by Fall under the power granted to him by Article XI of the contract of April 25, 1922. In support of this argument they make many allegations of fact which we contend the Record does not support. We do not desire to prolong this brief by again repeating the facts, which we have at length set forth, to demonstrate that Secretary Fall had the sole and absolute control of performance under the contract of April 25, 1922, and that he effectively participated in the making of the lease of December 11, 1922, pursuant to the preferential right granted by the contract of April 25, 1922. We have dealt with these matters *in extenso* at pages 249 to 258 and pages 95 to 102, *supra*, of this brief. Certainly the contract of December 11, 1922, would not be, within its own preambles, designated "supplementary" to the contract of April 25, 1922, nor would it so carefully refer to the preferential right to leases provided by the contract of April 25, 1922, if it had been the thought of those who negotiated and drafted it that it and its accompanying lease were made otherwise than pursuant to the contract of April 25, 1922.

E. THE TRANSPORT COMPANY AND THE PETROLEUM COMPANY ARE NOT ENTITLED TO BE CREDITED WITH THEIR RESPECTIVE DISBURSEMENTS UNDER THE FRAUDULENT AND ILLEGAL CONTRACTS AND LEASES.

Despite its finding that the contracts and leases were fraudulently procured from the United States, and despite its conclusion that the contracts and leases were illegal and wholly void, the Trial Court in ordering their surrender for cancellation decreed that (a) credit for the cost of the Pearl Harbor fuel depot should be allowed to the Transport Company in stating its account with the United States, and (b) credit for money expended in drilling and operating certain oil wells and making certain improvements on Naval Petroleum Reserve No. 1 should be allowed to the Petroleum Company in stating its account with the United States. A cross appeal from the allowance of such credits was taken by the Government; and the Court of Appeals held that the Appellants should not be reimbursed for their expenditures and improvements under the fraudulent and illegal contracts and leases. The opinion of Circuit Judge Gilbert clearly recognized that the present suit in equity was brought by the United States not only to protect itself against the fraudulent and illegal acts of its public officers but also to vindicate and enforce its constitutional and statutory "fuel depots" policy.

1. Allowance of credit for the Pearl Harbor project in stating the account of the Transport Company with the United States would be subversive of the "fuel depot" policy of the United States and in violation of the law of illegal public contracts.

(Point XVI, Appellants' brief, p. 316.)

We have above pointed out that by the uncontradicted testimony of Admiral Gregory, Chief of the Bureau of Yards

and Docks, and Admiral Robison, Chief of the Bureau of Engineering (R. II-576; III-1082-3), the storage facilities to be erected at Pearl Harbor were complete fuel depots. We have above pointed out, in Section D, 3, of this brief (p. 226, *ante*) that the power to locate and establish such a fuel depot lay in Congress and not in the Secretary of the Navy. We further call attention to constitutional and statutory provisions and to the uniform practice in connection with appropriations which demonstrate that this is so. We shall not repeat the argument here.

As there shown Admiral Robison admitted that the usual practice of getting approval from Congress and appropriation from Congress was avoided in the present instance because of trouble feared from Congress or some member thereof, and that for this reason silence was maintained about the project (R. III-1061-74). It is uncontradicted that the Pearl Harbor project was but the first step in a fuel depot building plan which had never been referred to Congress and which called for the ultimate expenditure for fuel depots to be located by the Navy Department of approximately one hundred and three millions of dollars (R. II-545-60; III-1103-4). In its opinion the Court of Appeals reviewed the statutory enactments and the legislative history touching the establishment of "fuel depots." In holding that Congress alone was empowered to locate and establish such depots, that Court stated, "it is not conceivable that by the rider to an Appropriation Bill (Act of June 4, 1920) Congress intended in that casual way to surrender its legislative functions as to the control and disposition of the naval oil reserves and the establishment of fuel oil depots for the Navy * * *" (R. III-1504-5).

The Court of Appeals in its decision clearly recognized that the present suit for the cancellation of the fraudulent and illegal contracts and leases was brought by the United States to vindicate and enforce its constitutional and statutory "fuel depot" policy (R. III-1508-10, 1512-13).

This Court and the inferior courts have not been slow to recognize that suits brought by the Government often stand

upon a higher and different footing from those instituted by private suitors. Whenever that situation arises, the special character of the proceedings is acknowledged; and principles of law and equity, which are adapted to the needs of ordinary litigants, are temporarily set aside in the interests of good government. If the implied right of a fraudulent defendant to reimbursement for benefits conferred upon an innocent plaintiff must yield in order to enforce a public statute and the public policy behind it, the defendant still has recourse to Congress, which may be trusted to do what is right under the circumstances and by its judgment he must abide.

This Court has repeatedly held that the equitable maxim: "He who seeks equity must do equity," should have no place in an equitable proceeding brought by the United States to enforce a public statute and its underlying policy. The Federal Courts will not permit the effectiveness of such a statute to be destroyed or its policy to be frustrated by imposing upon the United States the duty of reimbursing the violators for their expenditures as a condition to the granting of equitable relief. This has been frequently decided in proceedings for the cancellation of patents to public lands, regardless of whether the grounds for equitable relief be fraud, or lack of authority, or both.

A leading case involving fraud in the issuance of a patent to homestead lands is that of:—

Causey vs. United States, (1916), 240 U. S. 399.

This was a suit by the United States to recover the title to homestead land patented to the defendant and by him transferred to one Bradford. The bill charged fraud in that the defendant had at the time of the preliminary entry entered into an agreement with Bradford's agent for the transfer of the title when acquired. A demurrer was filed upon the ground, *inter alia*, that the plaintiff had not tendered back the consideration to the defendant.

The demurrer was overruled and an answer was filed by the defendant denying the unlawful agreement and fraud. The suit was then referred to a special master who found fraud and the trial court sustained the finding and entered a decree of cancellation.

The Fifth Circuit Court of Appeals affirmed the decree vacating the patent upon the ground that the appellant was guilty of fraud in obtaining and perfecting his homestead entry.

Counsel for the defendant in his brief in this Court argued that inasmuch as no act of Congress had declared a forfeiture in the case of fraud in the issuance of a patent for homestead land, the United States was bound to tender back to the defendant the consideration paid for the patent as a condition precedent to the maintenance of a bill in equity for cancellation. This Court affirmed the decree of cancellation. Mr. Justice Van Devanter in delivering the opinion of the Court said:—

(pp. 402-3): "The further objection is made that the bill cannot be maintained because it does not contain an offer to return the scrip received when the commuted entry was made. The objection assumes that the suit is upon the same plane as if brought by an individual vendor to annul a sale of land fraudulently induced. But, as this court has said, the Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization. **And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudu-**

lently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded. *United States vs. Trinidad Coal Co.*, 137 U. S. 160, 170-171; *Heckman vs. United States*, 224 U. S. 413, 447. And see *Rev. Stat.*, Sec. 2362; Act June 16, 1880, c. 244, Section 2, 21 Stat. 287; *Hoffeld vs. United States*, 186 U. S. 273; *United States vs. Commonwealth Trust Co.*, 193 U. S. 651; *United States vs. Colorado Anthracite Co.*, 225 U. S. 219."

A case involving the vindication of the governmental policy underlying the issuance of patents to coal lands, is that of:—

**United States vs. Trinidad Coal Co., (1890),
137 U. S. 160.**

This was a bill in equity brought by the United States to cancel patents to public coal lands procured through fraudulent entries made by the officers and employes of the defendant company. The defendant demurred to the bill upon the ground that it did not make a case for relief in a court of equity, nor allege that any of the entries were fraudulent or in contravention of law. The Trial Court sustained the demurrer and dismissed the bill.

Upon appeal to this Court, counsel for the defendant company argued that the United States must offer to refund the moneys furnished by the defendant company as a condition precedent to the filing of its bill for cancellation of the patent. This Court reversed the decree for dismissal with directions to overrule the demurrer and have further proceedings. In the opinion of Mr. Justice Harlan, the question of "tender of equity" was discussed as follows:—

(pp. 170-1): “* * * It is contended by the defendant that the United States is subject, as a suitor, to the same rules that control courts of equity when determining, as between private persons, whether particular relief should be granted; that the government, asking equity, must do equity; and, consequently, that the bill is defective in not containing a distinct offer to refund the moneys which, it is alleged, were furnished by the defendant to the several persons to whom patents were issued. The rule referred to should not be enforced in a case like the present one. In the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre required from those desiring to obtain a title to such lands had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people; and in making regulations for disposing of them, Congress took no thought of their pecuniary value, but, in the discharge of a high public duty and in the interest of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value. **The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions.** It is not disputed that the Attorney General may, in virtue of the authority vested in him, institute this suit. According to the allegations of the bill, which are admitted to be true, the defendant is a wrongdoer against whom the government seeks to vindicate its policy in reference to the development of its vacant coal lands. Congress when establishing that policy, was not bound to assume that individuals or associations of individuals would attempt to defeat it by means of fraudulent schemes or otherwise. **If the defendant is entitled, upon a cancellation of the patents fraudulently and illegally obtained**

from the United States, in the name of others, for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, we must assume that Congress will make an appropriation for that purpose, when it becomes necessary to do so."

Heckman vs. United States, (1911), 224 U. S. 413.

This was a suit by the United States to cancel certain conveyances of allotted Indian lands made by members of the Cherokee Nation. The bill alleged that said conveyances were in violation of certain statutes restricting the alienation of allotted Indian lands. A demurrer was filed upon the ground, *inter alia*, that the bill was wholly without equity.

The trial court sustained the demurrer and dismissed the bill. The 8th Circuit Court of Appeals reversed the judgment of the trial court in sustaining the demurrer.

Upon appeal to this Court it was argued by counsel for the defendant *inter alia*, that the bill was wholly devoid of equity, because the United States had not offered to return the consideration. This Court was of opinion that the bill was well brought, affirmed the judgment of the 8th Circuit Court of Appeals and ordered that the cause should proceed. Mr. Justice Hughes in delivering the opinion of the Court stated:

(pp. 446-7): "It is said that the allottees have received the consideration and should be made parties in order that equitable restoration may be enforced. Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render them of no avail. **The effectiveness of the acts of Congress is not**

thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the Statute. *United States vs. Trinidad Coal Co.*, 137 U. S. 160, 170, 171."

To like effect are the following cases:

Washington Securities Co. vs. United States, (1913), 234 U. S. 76.

United States vs. Poland, (1919), 251 U. S. 221, 228.

Diamond C. & C. Co. vs. Payne, (1921), 271 Fed. 362, 364-5.

A further citation of authorities is hardly necessary in support of the firmly established rule that in a suit brought by the United States to enforce a public statute and to maintain the public policy underlying it, the granting of relief will not be conditioned upon the reimbursement of the fraudulent defendant, and any affirmative relief, to which such a defendant may in good conscience be entitled, must lie within the sole discretion of Congress.

The present case contains all of the essential elements of the above cited cases. The United States is asking that those provisions in the Constitution and statute law of the United States, which vested in Congress the exclusive power to choose the location of naval fuel depots, and to authorize their construction shall be enforced. Such relief is sought against the Appellants, who have been found guilty of having practiced a fraud upon the Government.

In addition, there is the further element that the Pearl Harbor project is but the first step in a far-reaching building plan calling for the erection, without the consent of Congress, of naval fuel depots at an ultimate cost of approximately \$103,000,000.

The grave consequences that will necessarily follow from the failure of the Court to adhere to this rule of law in the present cause are readily to be foreseen. The reimbursement of the Transport Company for its Pearl Harbor expenditures can only mean that fraudulent and unauthorized Government officials may hereafter with impunity usurp the sole and exclusive power of Congress under the Constitution to select and to authorize the erection of fuel depots for the Navy. If their covinous acts are discovered, no harm can ensue, because, indeed, regardless of how unconscionable their conduct has been, the United States of America must pay the contractors their actual expenditures. Besides, there is always the possibility that their acts may not be discovered and any profits therefrom may thus be retained.

What a rare opportunity would thus be afforded to even well meaning but over-zealous Government agents to conspire to rectify that which in their opinion as patriotic citizens is an inexcusable neglect by Congress of its high duty to provide fuel depots adequate for the needs of the Navy, which it is charged to provide and maintain. But why be content with a modest \$103,000,000 fuel depot building plan? The re-assumption by Congress of the constitutionally given power to establish fuel depots, formerly so unwisely delegated to the Secretary of the Navy, will under court sanction become meaningless and without avail. Such sanction the Court of Appeals refused to give.

We submit, therefore, that this Court should in the interest of good government enforce the laws governing the establishment of "fuel depots;" and that in order to do so effectively, it should deny the Transport Company credit for its Pearl Harbor expenditures. It is our further contention that the allowance of such a credit is contrary to law in that the United States is in no wise bound by the unauthorized and illegal contracts of its agents and officers.

In holding that the Transport Company was not entitled to

be credited with its expenditures under the Pearl Harbor contracts, the Court of Appeals but reaffirmed the well-recognized rule that contracts entered into with the United States without authority of law are illegal and void; and that no liability for benefits received thereunder may be imposed upon the Government. This apparently harsh rule is a necessary corollary of the principle of law that one dealing with public officers is bound to take notice of the extent of their powers and assumes the risk of their acting strictly within their official authority. Upon such a party is imposed the affirmative duty of seeing that the agent of the Government acts fairly and in good faith, as well as within the scope of his authority, in making the contracts; and ignorance of the law furnishes no excuse.

A leading case in point is that of:

Sutton vs. United States, (1920), 256 U. S. 575.

This was an action to recover the balance alleged to be due under a contract with the War Department for dredging and excavating at unit rates. The appropriation was ample to defray the cost of the dredging at these rates assuming that the quantities of material to be removed did not greatly exceed the estimates presented by the specification. Relying upon erroneous estimates of an inspector, the constructor did more work than the appropriation would pay for, before the error was discovered. The Government engineer in charge immediately stayed the operation. The Court of Claims held that the United States was not obliged to pay for the work in excess of the appropriation.

Upon appeal to this Court, judgment was affirmed. Mr. Justice Brandeis sets forth at length in the opinion the acts of Congress authorizing the Secretary of War to undertake this dredging work, and then concludes:—

(p. 579): "The Secretary of War was, therefore, without power to make a contract binding the Government to pay more than the amount appropriated. See *Bradley vs. United States*, 98 U. S. 104, 113, 114. Those dealing with him must be held to have had notice of the limitations upon his authority."

Whiteside et al. vs. United States, (1876), 93 U. S. 247.

This was a suit to recover moneys expended in hauling, baling and ginning captured cotton under a contract with an assistant special agent of the Treasury Department. The Court of Claims held that the assistant special agent had no power to make the contract, and therefore dismissed the suit. This Court affirmed the judgment of the Court of Claims.

(p. 257): "Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusions, might be turned to the detriment and injury of the public. *Mayor vs. Eschback*, 17 Md. 282.

"Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act. *State vs. Hayes*, 52 Mo. 578; *Delafield vs. State*, 26 Wend. 238; *People vs. Bank*, 24 id. 431; *Mayor vs. Reynolds*, 20 Md. 10."

The following decisions are in accord:

The Floyd Acceptances, (1868), 74 U. S. 666, 680;

- Chase vs. United States, (1894), 155 U. S. 489, 502;**
Hooe vs. United States, (1910), 218 U. S. 322, 333-4;
Utah P. & L. Co. vs. United States, (1916), 243 U. S. 389, 408-9;
United States vs. Levinson, et al., (1920), 267 Fed. 692, 694;
United States vs. Bentley & Sons Co., (1923), 293 Fed. 229, 234-5.

The Appellants emphasize in their brief the fact that the alleged contracts of April 25 and December 11, 1922, were beneficial ones and that the United States of America received full value for every dollar spent thereunder. A like argument was unsuccessfully advanced in aid of an illegal government contract in the case of:—

Filor vs. United States, (1869), 76 U. S. 45.

An action was brought in the Court of Claims for rent alleged to be due under a lease of premises for the use of the Quarter-Master's Department of the United States Army. No rent was paid during the five years' use and occupancy and the lease was not disapproved by the Quarter-Master General until four years after its execution.

The Court of Claims held that the lease was illegal and void. Upon appeal to this Court, the decision was affirmed in an opinion which held that the claimants must seek relief from Congress, if they were entitled to compensation for the use of their property:—

(p. 49): "The doctrine of estoppel, which the counsel invokes, has no application. There is no place where the doctrine can come in. The officers at Key West did not represent the United States, except in their military capacity, though assuming to do so. In signing the agreement and in taking possession of the premises claimed by

the petitioners, they acted on their own responsibility. **Their unauthorized acts cannot estop the government from insisting upon their invalidity, however beneficial they may have proved to the United States. If the petitioners are entitled to compensation for the use of the property they must seek it from Congress. The Court of Claims can award them none."**

From the foregoing cases, there can be no doubt but that under the existing federal law an illegal contract with the United States of America is a nullity and will impose no liability express or implied upon the Government to pay for work done or benefits received thereunder.

The instant case cannot be distinguished in principle or fact. Here, as there, we have a contract made with a public officer, whose powers are strictly defined and limited. Here, as there, the authority of that public officer is transgressed and exceeded. Here, as there, a court of competent jurisdiction has decided that the contract is for that reason illegal, void and of no effect. **Here, however, as contradistinguished from those cases, the attention of the contracting party is directed to the possible illegality of the contract and he knowingly assumes the risk of the Government agent having exceeded his authority.**

Even if it be assumed for the purposes of the present argument that a court of equity may in the exercise of its discretion disregard the law and by entering a conditional decree, create an implied liability under an illegal contract, what is there in the actions of the Appellants to move the conscience of a court of equity? They deliberately disregarded their legally imposed duty of seeing that a Government officer acts fairly and in good faith and within the limits of his power and were not only unwilling to submit the question of the legality of their government contract to the law officer of the Government but actually prevented

such a submission. We refer to the letter which Director Bain on May 12, 1922, wrote to Secretary Fall, reciting the difficulties that had arisen through objections raised to the legality of the alleged contract of April 25, 1922, and suggesting that the opinion of the Attorney General be obtained (Def. Ex. EEE; R. II-784). The Appellants blocked the sending of the letter and that was before any work under the contract had been commenced (R. II-786-87).

We do not intend to repeat here the various objections that were raised to the legality of the alleged contracts, both before and after their execution. These we have shown were a very significant badge of the fraud found in this case. Reference was made in passing to the proposed letter of May 12, 1922, from Director Bain to Secretary Fall, to bring out clearly the fairness as well as the necessity of enforcing in the present case the long established rule of law that a party contracting with the Government is bound at his peril to see that the agent of the Government acts *bona fide* within the scope of his authority in making a contract, and not without such scope.

The Court of Appeals cited most of the above authorities in its opinion; and consequently held that the equitable maxim as to doing equity was not applicable in the present suit because the United States here sought to assert its dominion over the public lands, to enforce a long recognized public policy as to "fuel depots," and to avail itself of substantial rights under statutory provisions; and held that the illegality of the contracts barred any express or implied liability on the part of the United States for work done thereunder (R. III-1506-13). To hold otherwise in the present case would not only subvert the constitutional and statutory "fuel depot" policy of the United States but also vitiate and render nugatory that salutary rule of law which, in the interest of good government and the public weal, forbids any recovery against the Government upon the illegal contract of

its officers and agents and relegates the parties to Congress for any relief which justice or the circumstances may peculiarly warrant.

The brief of the Appellants ignores the statutory and legislative history touching the establishment of "fuel depots" and does not deny the well recognized principle of law and equity that the United States is not bound to do equity where it is suing in its sovereign capacity to vindicate its public policy as declared by the Constitution and the statutes. They earnestly contend that the Transport Company is entitled to credit for its Pearl Harbor disbursements irrespective of the illegality of the contract.

The first ground urged in support of such contention (Appellants' brief, pp. 317, 327-29) is that the United States is here seeking to recover back voluntary payments made under a beneficial contract, whereas the Appellants are not asking for affirmative relief against the United States, but are simply seeking to maintain the status existing prior to the execution of the illegal contracts. To support their contention certain language is quoted from the opinions in the cases of *Diamond C. & C. Co. vs. Payne* (1921) 271 Fed. 362, and *United States vs. Royer*, (1925) 268 U. S. 394.

The Appellants fallaciously speak of preserving the *status quo ante*, meaning thereby that they shall be allowed to keep the royalty crude oil received pursuant to the fraudulent and illegal Pearl Harbor contracts. The phrase has no reference whatever to restoring the United States to the position in which it stood before the contracts were entered into. It refers to the position of the parties after the performance of the contract; and is used only as a cloak to cover up an unconscionable retention of benefits unlawfully received at the expense of the Government. The statement by the Appellants that the performance of the fraudulent and illegal contract re-establishes the status existing prior to their execution is obviously unsound and requires no answer.

The authorities cited by the Appellants in support of their contention that the United States should be required to do equity because it is the actor do not sustain their position.

The facts and decision of the *Diamond C. & C. Co.* case are judiciously avoided. The Court of Appeals for the District of Columbia refused to compel the Secretary of the Interior to return scrip used in a fraudulent entry, basing its decision on the very cases cited by the Ninth Circuit Court of Appeals as a reason why the doing of equity was not required in the present case. Chief Justice Smyth distinguished in his opinion the case of *Stoffela vs. Nugent*, (1909) 217 U. S. 499, which was there relied upon by the defendant coal company and is now relied upon by the Appellants, upon the ground that it was a suit between private parties and that therefore the public policy mentioned in the case of *Causey vs. United States* (*supra*), did not apply.

The case of *United States vs. Royer*, (1925) 268 U. S. 394, is cited as a binding precedent permitting the Appellants to retain the reimbursements already received by them under the fraudulent and illegal contracts and leases. But this case too is readily distinguishable upon its facts and law. The United States was there sued for a certain amount deducted from the pay of a *bona fide* and *de jure* army officer. It appears that upon the recommendation of his Commanding General, the officer was promoted from lieutenant to major, in which rank he served for some time performing the duties thereof and receiving the pay therefor. Upon the subsequent discovery that there was no vacancy at that time in the office of major, the increased pay of the major was deducted from his pay as an officer. The Court of Claims held and this Court affirmed that in equity and good conscience he should not be required to refund the money paid to him for services actually rendered in an office held *de facto*, for which services the Government presumably had been benefited to the extent of the payment. It should be noted in the first place that

the army officer was acting *bona fide* and not *mala fide* as the Appellants. In the second place, it is worthy of note that no public policy forbade his appointment as major or his rendering services as such. And finally, it should be noted that the claimant was an officer *de facto* if not an officer *de jure*; whereas, in the present case, the contracts and leases under which the services were performed are wholly null and void for illegality.

The contention that the payments in Government royalty crude oil were voluntarily made and may not therefore be recovered is but covertly contending that the United States may be estopped by the unlawful acts of its public officers, a doctrine which this Court has recently repudiated in the case of **Jeems Bayou Club vs. United States, (1922), 260 U. S. 561.**

Frequent mention is made in the brief of the Appellants (pp. 320, 351) of a supposedly "double accounting," just as if the United States in demanding a return of the property of which it has been fraudulently and illegally deprived is requiring them to make double payments. Complaint is also made that the United States will be unjustly enriched if the Appellants are compelled to disgorge the Government royalty crude oil heretofore received. But the cases above cited establish beyond peradventure that the penalty imposed for the making of an illegal contract is that the Government shall incur no liability for benefits received thereunder. The deterrent feature of that rule will be destroyed if, as here, a fraudulent party to an illegal contract is to be credited with his expenditures thereunder.

And lastly it is contended that a court of equity should not be converted into a tribunal for the administration of penalties (Appellants' brief, pp. 321-22, 324), the Appellants thereby hoping to avoid the consequences of their illegal transactions, viz., that they may not be reimbursed for work performed and materials furnished under fraudulent and illegal

contracts. The rule set forth in the above cited cases (pp. 273-77, this brief *ante*) is that just this penalty follows such fraudulent and illegal dealing with Government officials.

The second reason assigned by the Appellants in support of their contention that the Transport Company should be reimbursed for its expenditures (Appellants' brief, pp. 334-36, 337-39) is that the illegal Pearl Harbor contracts are purely a commercial transaction. All of the cases cited in their brief in support of this argument are clearly distinguishable from the present case because they are suits brought by the United States to cancel or enforce commercial contracts, which were not in violation of any public policy, with the sole exception of the case of *United States vs. Debell*, (1915) 227 Fed. 775, where the United States was required to refund the money paid for Indian lands by a fraudulent purchaser from an incompetent Indian woman allottee **because of its negligence** in issuing the patent in fee. The Debell case did not take into consideration the public policy forbidding the transfer of Indian lands and cannot be considered law in view of the decision by this Court in *Heckman vs. United States*, (*supra*). In the latter case, a bill to cancel certain conveyances of allotted Indian lands made in violation of certain statutory restrictions on alienation was sustained on demurrer in an opinion by Mr. Justice Hughes holding that the policy of the statute and the effectiveness of the Acts of Congress could not be destroyed by requiring the United States to repay the purchase price.

The fallacy of the Appellants' argument is readily apparent. In determining whether or not the equitable principle of doing equity shall yield in the interest of good Government, the Court looks at the nature and character of the present proceedings and the capacity in which the United States sues and is not concerned with the character and nature of the transaction sought to be set aside. Besides, their argument assumes that the United States has acted in an alleged com-

mercial transaction; whereas the Government is never bound by the unauthorized and illegal acts of its public officers, and no transaction whatever, to which the United States is in any true sense a party, was here made.

Much space in the brief of the Appellants (pp. 333-37) is devoted to an attempt to distinguish the cases cited by the Court of Appeals and in this brief in support of the principle that the doing of equity has no place in a suit brought by the United States in its sovereign capacity to vindicate a public policy. The first ground of distinction alleged by the Appellants is that the said cases involve the violation of an express statutory prohibition. This argument overlooks the fact that the contracts and leases now under attack violated the statutory and constitutional provisions governing the establishment of "fuel depots."

Another alleged distinction is that the United States was acting in the said cases in a sovereign capacity. That the United States is so acting in the present suit has already been pointed out in this brief. A further alleged ground of distinction is that the Pearl Harbor contracts involve no questions as to the public domain. This is hardly accurate in view of the fact that the usufruct of the Naval Petroleum Reserves has been fraudulently and illegally converted to reimburse the Transport Company for its Pearl Harbor expenditures and also in view of the fact that the Trial Judge found that the contracts and leases were indissolubly tied together and formed but a single transaction. Finally, it is argued that the contracts of the Transport Company are merely *ultra vires* and involve no violation of the express prohibition of any law. This is a clear evasion of the entire constitutional and statutory declaration concerning "fuel depots."

The case of *United States vs. Detroit Lumber Company*, (1905) 200 U. S. 321, is cited by the Appellants in support

of the statement that the maxim of equity that "he who seeks equity must do equity" should be enforced except as limited by special statutory provisions. The opinion in the Detroit Lumber case is interesting because it shows that the United States was permitted not only to recover the lands from a fraudulent patentee but also to retain the price paid therefor, although it could not recover from a *bona fide* purchaser the price he had already paid to the fraudulent patentee for certain timber.

In an obvious attempt to divert attention from the fact that the Appellants procured the illegal Pearl Harbor contracts by fraud and in pursuance of a conspiracy to defraud the United States, the Appellants repeatedly refer to the good faith of the Secretary of the Navy. How such reference can palliate their bad faith does not appear. They accuse the President and the Congress of the United States as well as the head of the Navy Department of unconscionable conduct because the said parties "with full knowledge that this great and expensive work was in progress, permitted it to proceed to the end that the government might have the manifest advantage thereof" (Appellants' brief, p. 348). We are at a loss to understand this unwarranted aspersion. Well knowing that their illegal contracts and leases were under attack and the subject of Congressional inquiry, the Appellants refused to be deterred thereby but continued to perform the same, thus voluntarily assuming the risk of their contracts and leases being subsequently cancelled for fraud and illegality. After the present suit was instituted, counsel stipulated for the completion of certain tanks because of the danger of their utter destruction pending a final determination of the validity of the contracts, such stipulation expressly providing that the work permitted thereunder would be without prejudice to the rights of the parties. Such a stipulation was as much of an advantage to the Appellants as to the Government.

2. Allowance of credit for expenditures and improvements on Naval Petroleum Reserve No. 1 in stating the account of the Petroleum Company with the United States would be subversive of the "fuel depot" policy of the United States and in violation of the law governing *mala fide* trespasses upon the public domain.

(Point XVII, Appellants' brief, p. 349.)

It stands admitted that one of the prime objects and considerations for the leasing of Naval Petroleum Reserve No. 1 was the construction of "fuel depots" at Pearl Harbor out of the royalty crude oil accruing therefrom. To require the United States to reimburse the Petroleum Company for moneys expended in drilling and operating certain oil wells and making certain improvements under the fraudulent and illegal leases is not only contrary to law and good conscience but is also in derogation of the exclusive right in Congress to establish fuel depots for the Navy. Let us first take up the latter objection.

The leases of June 5 and December 11, 1922, are inextricably interwoven with the fraudulent and illegal contracts of April 25 and December 11, 1922. In fact, they are of the very essence of that vast fuel depot building plan, of which the Pearl Harbor project was the first step and which called for the ultimate expenditure of approximately \$103,000,000. The success of that adventure depended upon the immediate establishment of an oil credit, sufficiently large to meet its rapidly growing demands. Without such a credit, construction work must necessarily lag and eventually be curtailed.

The insufficiency of the oil credit then established to take care of the enlarged Pearl Harbor project manifested itself by December 11, 1922. The erection of that fuel depot must not be stopped or slowed down. Congress under no circum-

stances was to be approached for an appropriation. The only escape then apparent from this dilemma lay in the immediate leasing of Naval Reserve No. 1 under the preferential right conferred under the illegal and fraudulent contract of April 25, 1922. Accordingly, that was done.

In the light of these facts, we submit that if the sole and exclusive power of Congress to select the sites for naval fuel depots and to authorize their construction is to be effectively upheld, then the fraudulent and illegal leases of June 5 and December 11, 1922, must be uncompromisingly struck down. They were the sinews of war which rendered possible and supported the unwarranted attack made upon that power. The line of reasoning followed and the cases cited in the preceding section of this brief in support of the first objection raised to the allowance of credit for the Pearl Harbor expenditure apply with equal force to the objection now being urged. We respectfully refer the Court back to that section of our brief and will thus avoid the necessity of repeating the argument here.

The brief of the Appellants with studied care avoids all reference to the statutory and constitutional "fuel depot" policy of the United States in urging that the Petroleum Company shall be allowed credit for its expenditures and improvements.

The Court of Appeals held that the Petroleum Company could not be allowed credit for moneys expended in drilling and operating oil wells and making improvements under the illegal leases because of the *mala fides* of its trespass upon the public domain. It further held that the *mala fides* of the present trespass followed from the findings of the Trial Court (R. III-1513). The cases cited and followed in the opinion of the Court of Appeals will be hereinafter discussed.

In protecting the public domain from the depredations and devastating waste of unscrupulous parties, the federal courts held at an early date that a distinction must be drawn between the innocent trespasser and the wilful and *mala fide* trespasser.

In assessing the damages for the waste committed by the innocent trespasser, credit was allowed for his costs in extracting the mineral and for the value of permanent improvements to the realty. But no quarter was shown the wilful trespasser in his wrongful raids upon the public wealth. Not only must he account for the full market value of all minerals extracted from public lands, together with any and all accretions thereto; but also he forfeited all permanent improvements to the realty. In no event was he permitted to improve the United States out of its lawful property or to make a profit at its expense. And his actual costs in extracting the mineral were never recoverable.

The foregoing principles of law were laid down and followed in the case of:—

**Pine River Logging Co. vs. U. S., (1902),
186 U. S. 279.**

This was an action in trover brought by the United States against the Pine River Logging Company, *et al.*, to recover damages suffered from an alleged wrongful entry by the defendants upon an Indian reservation and the cutting and removing of certain pine timber thereon. A verdict for \$88,269.94 was directed in favor of the United States, which verdict was affirmed by the 8th Circuit Court of Appeals. Upon appeal to this Court the judgment was affirmed subject to a deduction of \$353.69, being an improperly allowed reporter's fee for transcribing the record.

The complaint charged that nine different parties did at the special instance and request of the defendant enter upon the Mississippi Indian Reservation and cut into logs certain pine trees, which they delivered to the defendants, who thereupon manufactured the logs into lumber, which they subsequently sold and appropriated the proceeds thereof to their own use.

The answers alleged that the logs had been cut under con-

tracts executed under the Act of February 16, 1889 (25 Stat. 673), governing the cutting of timber on Indian lands; and that payment for the logs had been made in full to the United States and to the proper Indian agent in accordance with the said contracts. The answers further averred that the cutting and delivery of the said logs had been in good faith and in the honest belief that said logs had been lawfully cut under the contracts.

The United States replied that the logs had been cut from pine trees that were alive and standing, whereas the contracts authorized only the cutting of dead and down timber.

Mr. Justice Brown in delivering the opinion of this Court found that the Government was not estopped from asserting its rights to recover for timber cut beyond the quantity and quality specified in the contract, although the Government agent had consented or acquiesced in such an unauthorized and unlawful cutting; and also found that because the defendants were not innocent trespassers, the proper measure of damages was the full market value of the timber, when seized, without any credit for the labor expended thereon. We quote the following language from the opinion:—

(p. 292): "The third assignment of error is directed to the proper measure of damages, which were assessed at the value of the logs as they were banked upon the streams and lakes in the neighborhood of where they were cut. It is insisted that the proper measure was the value to the government of the timber before the Indians or the contractors had, by their labors, added to that value."

(p. 293): "The case of *Woodenware Co. vs. United States*, 106 U. S. 432, is decisive of the law in this connection. That was also an action of trover brought by the United States for the value of 242 cords of ash timber cut from the Oneida reservation in the State of Wisconsin. The timber was knowingly and wrongfully taken from the reservation by Indians, and carried to a distant

town, where it was sold to the Woodenware Company, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase. The timber on the ground, after it was felled, was worth twenty-five cents per cord, and at the town where the defendants bought it, \$3.50 per cord. The question was whether the liability of the defendant should be measured by the value of the timber on the ground where it was cut, or at the town where it was delivered. **It was held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Upon the other hand, if the trespass be wilfully committed, the trespasser can obtain no credit for the labor expended upon it, and is liable for its full value when seized; and if the defendant purchase it in its then condition, with no notice that it belonged to the United States, and with no intention to do wrong, he must respond by the same rule of damages as his vendor would, if he had been sued. 'This right' (of the recovery of the property), said the court, 'at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer, defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.'**"

Woodenware Company vs. U. S. (1882), 106 U. S. 432.

This was an action of trover brought by the United States to recover the value of 242 cords of ash timber cut and

removed from the Oneida Indian Reservation. This timber was knowingly and wrongfully taken from the land by the Indians, who then carried it some distance to the town of Depere and there sold it to the defendant. The latter was not chargeable with any intentional wrong or misconduct, or bad faith in the purchase.

The timber on the ground after it was felled was worth 25 cents per cord; and at the town of Depere it was worth \$3.50 per cord. The trial Judge found that the defendant was liable for the value of the timber at Depere, and judgment was rendered against the defendant for that sum. On appeal to this Court the judgment of the trial court was affirmed.

In the opinion affirming the judgment Mr. Justice Miller said:—

(p. 433): "The doctrine of the English courts on this subject is probably as well stated by Lord Hatherley in the House of Lords, in the case of *Livingstone vs. Rawyards Coal Co.*, 5 App. Cas. 25, as anywhere else. He said: 'There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, **the court of equity in this country will struggle, or, I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement.**'"

The following cases are in accord:—

- Benson Min. Co. vs. Atla Min. Co., (1891), 145 U. S. 428;
- Guffey vs. Smith, (1914), 237 U. S. 101;
- Union Naval Stores vs. United States, (1915), 240 U. S. 284;
- Big Sespe Oil Co. vs. Cochran, (1921), 276 Fed. 216, (C. C. A. 9).

The Appellants do not deny that under the above cases a *mala fide* trespasser on the public domain is not entitled to be credited with his improvements or costs of extraction and must account in full for the waste committed against the United States. Nor is any effort made to counteract the *mala fides* of the trespass of the Petroleum Company upon the Naval Petroleum Reserve. While not contradicting the measure of damages laid down in these cases, the Appellants, nevertheless, attempt to distinguish them from the present case and thus prevent the instant application of that measure of damages.

The first alleged ground of distinction (Appellants' brief, pp. 349-50) is that these cases are inapplicable because the parties named therein were not trespassers "under a contract." The fact remains, however, that the Appellants were trespassers; and it is immaterial that they entered into possession under leases that were not only illegal, null and void, but also were, in the eyes of the law, known by the Appellants to be thus illegal, null and void. Besides, the shield of "color of title" may never be raised by fraudulent trespassers in their own defense. This was definitely held in the case of **Big Sespe Oil Company v. Cochran**, 276 Fed. 216, (1921) (9th C. C. A.) where a trespasser under a sheriff's deed was strictly held to the measure of damages laid down in the Woodenware case (*supra*). No mention was made of this case by the Appellants for obvious reasons.

We have previously pointed out in this brief how recklessly the Appellants refused to submit to the Attorney General the legality of the Pearl Harbor project before any expenditures whatever had been incurred. Such refusal was all the more remarkable in view of the fact that on or before April 25, 1922, the Appellants questioned the power and right of the Secretary of the Interior to sign the contract of April 25, 1922, and insisted that the Secretary of the Navy should join as a party signatory. Apparently, that fear had subsided by June 5, 1922, for the Secretary of the Interior alone signed the lease of that date. But, on December 11, 1922, this precautionary measure was again taken, as both the contract and the lease

of that date are signed by both Secretaries. These additional circumstances not only emphasize the wilfulness and lack of good faith on the part of the Appellants but also show that the Appellants deliberately assumed the risk that their entry upon the public domain might be subsequently adjudged a trespass.

The other alleged ground of distinction is a slight variation of the foregoing position. It is our old friend "compulsory expenditures" under a new cloak. How this factor can estop the United States or can lessen the fraudulent waste committed on the public domain does not appear. It is suggested that to enforce the rule of the *Woodenware* case (*supra*) in the present case would be "the imposition of an excessively harsh penalty—a thing abhorred by equity—" (Appellants' brief, p. 351); but no account is taken of the fact that such a "harsh rule" has been invariably applied by federal courts of equity in suits brought against *mala fide* trespassers (such as the Appellants) upon the public domain. Little does it lie in the mouth of those who have fraudulently conspired to defraud the United States to complain against a measure of damages adopted for the salutary purpose of preventing spoliation of the natural resources of the Government. The efficacy of that measure of damages is truly tested in cases like the present one and should not be impaired.

The Appellants half heartedly argue (Appellant's brief, p. 351) that an equity is raised in the present case requiring the Government to maintain the Petroleum Company in the position occupied before the leases were made and that such *status quo ante* is re-established by the receipt of oil by the Petroleum Company from the leased lands. The statement shows on its face its inherent fallacy. The Appellants have no intention of restoring to the United States the oil and gas minerals of which the Government has been despoiled but are merely seeking to retain their fraudulent and illegal spoils.

We respectfully submit that the decree of the Circuit Court of Appeals should be affirmed.

ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel for the United States.

APPENDIX.**1. EXECUTIVE ORDER OF WITHDRAWAL OF
SEPTEMBER 2, 1912.****ORDER OF WITHDRAWAL.****Naval Petroleum Reserve No. 1.**

It is hereby ordered that all lands included in the following list and heretofore forming a part of Petroleum Reserve No. 2, California No. 1, withdrawn on July 2, 1910, from settlement, location, sale, or entry and reserved for classification and in aid of legislation under the authority of the act of Congress entitled:

"An act to authorize the President of the United States to make withdrawals of public lands in certain cases" (36 Stat. 847), shall hereafter, subject to valid existing rights, constitute Naval Petroleum Reserve No. 1 and shall be held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by act of Congress. To this end, and for this public purpose, the order of July 2, 1910, is modified and the withdrawal of that date is continued and extended in so far as it affects these lands.

Mt. Diablo Meridian.

T. 30 S., R. 22 E., Sec. 24, all.

T. 30 S., R. 23 E., Sec. 10, all;

Secs. 12 to 30, inclusive;

Secs. 32 to 36, inclusive.

T. 31 S., R. 23 E., Secs. 1 to 4, inclusive;

Secs. 10 to 14, inclusive.

T. 30 S., R. 24 E., Secs. 17 to 20, inclusive;

Secs. 28 to 34, inclusive.

T. 31 S., R. 24 E., Secs. 1 to 12, inclusive;

Sec. 18, all.

WM. H. TAFT,
President.

SEPT. 2, 1912.

ORDER OF WITHDRAWAL.

It is hereby ordered that all lands included in the following list and heretofore forming a part of Petroleum Reserve No. 2, California No. 1, withdrawn on July 2, 1910, from settlement, location, sale, or entry and reserved for classification and in aid of legislation under the authority of the act of Congress entitled:

"An Act to authorize the President of the United States to make withdrawals of public lands in certain cases" (36 Stat. 847), shall hereafter, subject to valid existing rights, constitute Naval Petroleum Reserve No. 2 and shall be held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by act of Congress. To this end and for this public purpose the order of July 2, 1910, is modified and the withdrawal of that date is continued and extended in so far as it affects these lands.

T. 31 S., R. 23 E., Secs. 7 to 9, inclusive;
Secs. 15 to 18, inclusive;
Secs. 20 to 23, inclusive;
Secs. 25 to 29, inclusive;
Secs. 33 to 36, inclusive.
T. 31 S., R. 24 E., Secs. 30 to 32, inclusive.
T. 32 S., R. 23 E., Secs. 1 to 3, inclusive;
Secs. 11 to 13, inclusive.
T. 32 S., R. 24 E., Secs. 2 to 18, inclusive.
T. 32 S., R. 24 E., Sec. 18, all.

WM. H. TAFT,
President.

December 13, 1912.

3. ACT OF FEBRUARY 25, 1920 (41 STAT. 437).

SEC. 18. That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this act, of all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest, under the pre-existing placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than $12\frac{1}{2}$ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: *Provided*, That not more than one-half of the area, but in no case to exceed three thousand two hundred acres, within the geologic oil or gas structure of a producing oil or gas field shall be leased to any one claimant under the provision of this section when the area of such geologic oil structure exceeds six hundred and forty acres. Any claimant or his successor, subject to this limitation, shall, however, have the right to select and receive the lease as in this section provided for that portion of his claim or claims equal to, but not in excess of, said one-half of the area of such geologic oil structure, but not more than three thousand two hundred acres.

All such leases shall be made and the amount of royalty to be paid for oil and gas produced, except oil or gas used for production purposes on the claim, or unavoidably lost, after the

execution of such lease shall be fixed by the Secretary of the Interior under appropriate rules and regulations: *Provided, however,* That as to all like claims situate within any naval petroleum reserve the producing wells thereon only shall be leased, together with an area of land sufficient for the operation thereof, upon the terms and payment of royalties for past and future production as herein provided for in the leasing of claims. No wells shall be drilled in the land subject to this provision within six hundred and sixty feet of any such leased well without the consent of the lessee: *Provided, however,* That the President may, in his discretion, lease the remainder or any part of any such claim upon which such wells have been drilled, and in the event of such leasing said claimant or his successor shall have a preference right to such lease: *And provided further,* That he may permit the drilling of additional wells by the claimant or his successor within the limited area of six hundred and sixty feet theretofore provided for upon such terms and conditions as he may prescribe.

No claimant for a lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Government affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the Act entitled "An Act to amend an Act entitled 'An Act to protect locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest,' approved March 2, 1911," approved August 25, 1914 (Thirty-eighth Statutes at Large, page 708), shall be paid over to the parties entitled thereto. In the case of conflicting claimants for leases under this section, the Secretary of the Interior is authorized to grant leases to one or

more of them as shall be deemed just. All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear, subject, however, to the same limitation as to area and acreage as is provided for claimant in this section: *Provided*, That no claimant acquiring an interest in such lands since September 1, 1919, from a claimant on or since said date claiming or holding more than the maximum allowed claimant under this section shall secure a lease thereon or any interest therein, but the inhibition of this proviso shall not apply to an exchange of any interests in such lands made prior to the 1st day of January, 1920, which did not increase or reduce the area or acreage held or claimed in excess of said maximum by either party to the exchange: *Provided further*, That no lease or leases under this section shall be granted, nor shall any interest therein inure, to any person, association, or corporation for a greater aggregate area or acreage than the maximum in this section provided for.

SEC. 18a. That whenever the validity of any gas or petroleum placer claim under pre-existing law to land embraced in the Executive order of withdrawal issued September 27, 1909, has been or may hereafter be drawn in question on behalf of the United States in any departmental or judicial proceedings, the President is hereby authorized at any time within twelve months after the approval of this Act to direct the compromise and settlement of any such controversy upon such terms and conditions as may be agreed upon, to be carried out by an exchange or division of land or division of the proceeds of operation.

4. ACT OF JUNE 4, 1920 (41 STAT. 812).

Investigation of Fuel Oil and Other Fuel: For an investigation of 'fuel oil, gasoline, and other fuel adapted to naval requirements, including the question of supply and storage and the availability economically and otherwise of such supply as may be allowed by the naval reserves on the public domain, and for such other expenses for transportation and hire of vehicles in connection with naval petroleum reserves, as the Secretary of the Navy may deem appropriate, for the purchase of necessary instruments and appliances, for the extension of the naval fuel-oil testing plant at the navy yard, Philadelphia, Pennsylvania, and the temporary employment of civilian experts and assistants \$30,000: *Provided*, That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves as are or may become subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled "An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," or pending applications for United States patent under any law; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States: *And provided further*, That the rights of any claimant under said act of February 25, 1920, are not affected adversely thereby: *And provided further*, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922: *Provided further*, That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct.

5. EXECUTIVE ORDER OF MAY 31, 1921.

EXECUTIVE ORDER

Under the provisions of the Act of Congress approved February 25, 1920 (41 Stat. 437), authorizing the Secretary of the Interior to lease producing oil wells within any naval petroleum reserve; authorizing the President to permit the drilling of additional wells or to lease the remainder or any part of a claim upon which such wells have been drilled, and under authority of the act of Congress approved June 4, 1920 (41 Stat. 912), directing the Secretary of the Navy to conserve, develop, use, and operate, directly or by contract, lease, or otherwise, unappropriated lands in naval reserves, the administration and conservation of all oil and gas bearing lands in naval petroleum reserves Nos. 1 and 2, California, and naval petroleum reserve No. 3 in Wyoming, and naval shale reserves in Colorado and Utah, are hereby committed to the Secretary of the Interior subject to the supervision of the President, but no general policy as to drilling or reserving land located in a naval reserve shall be changed or adopted except upon consultation and in cooperation with the Secretary or Acting Secretary of the Navy. The Secretary of the Interior is authorized and directed to perform any and all acts necessary for the protection, conservation, and administration of the said reserves, subject to the conditions and limitations contained in this order and existing laws or such laws as may hereafter be enacted by Congress pertaining thereto.

WARREN G. HARDING.

THE WHITE HOUSE,

May 31, 1921.